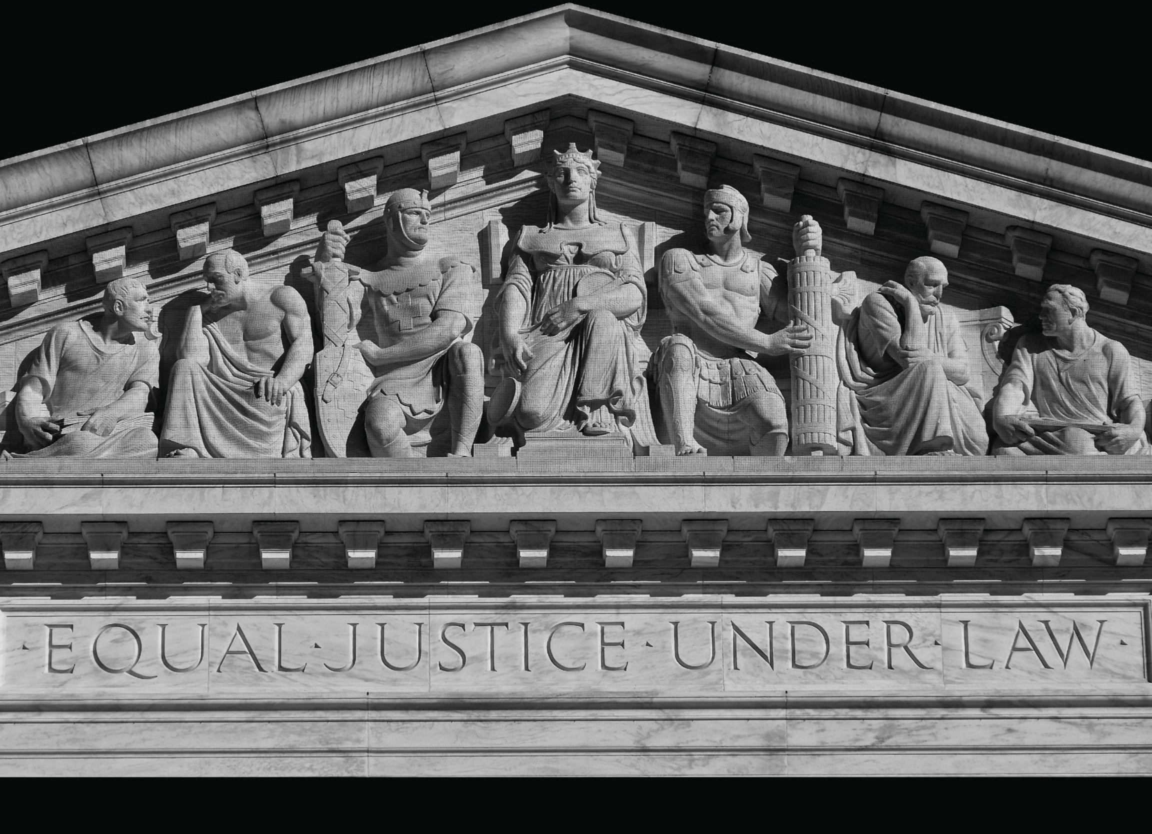
EIGHTH EDITION

JUDICIAL PROCESS AND JUDICIAL POLICYMAKING

G. Alan Tarr


EQUAL·JUSTICE·UNDER·LAW

Judicial Process and Judicial Policymaking

An excellent introduction to judicial politics as a method of analysis, the eighth edition of *Judicial Process and Judicial Policymaking* focuses on policy in the judicial process. Rather than limiting the text to coverage of the U.S. Supreme Court, G. Alan Tarr examines the judiciary as the third branch of government, and weaves four major premises throughout the text: (1) Courts in the United States have always played an important role in governing and their role has increased in recent decades; (2) Judicial policymaking is a distinctive activity; (3) Courts make policy in a variety of ways; and (4) Courts may be the objects of public policy, as well as creators.

New to the Eighth Edition

- Discusses appointments by Presidents Donald Trump and Joseph Biden to the federal courts, including the confirmations of Gorsuch, Kavanaugh, Coney Barrett, and Jackson to the Supreme Court.
- Introduces the controversy of the Supreme Court's "shadow docket."
- Analyzes the legal and political aftermath of the *Dobbs v. Jackson Women's Health Organization* overruling *Roe v. Wade*.
- Examines other key state and federal rulings on non-unanimous verdicts in criminal cases, gerrymandering, climate change, and separation between church and state.

G. Alan Tarr received his doctorate from the University of Chicago. He is Board of Governors professor of political science emeritus and founder of the Center for State Constitutional Studies at Rutgers University, Camden. Professor Tarr has served as a constitutional consultant in Russia, South Africa, Cyprus, and Myanmar. A three-time NEH Fellow, he has most recently completed a study of judicial independence and accountability in the American states.

Taylor & Francis
Taylor & Francis Group
http://taylorandfrancis.com

Judicial Process and Judicial Policymaking

EIGHTH EDITION

G. ALAN TARR

Routledge
Taylor & Francis Group
NEW YORK AND LONDON

Cover image: © Getty Images

Eighth edition published 2024
by Routledge
605 Third Avenue, New York, NY 10158

and by Routledge
4 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

Routledge is an imprint of the Taylor & Francis Group, an informa business

© 2024 G. Alan Tarr

The right of G. Alan Tarr to be identified as author[/s] of this work has been asserted in accordance with sections 77 and 78 of the Copyright, Designs and Patents Act 1988.

All rights reserved. No part of this book may be reprinted or reproduced or utilised in any form or by any electronic, mechanical, or other means, now known or hereafter invented, including photocopying and recording, or in any information storage or retrieval system, without permission in writing from the publishers.

Trademark notice: Product or corporate names may be trademarks or registered trademarks and are used only for identification and explanation without intent to infringe.

First edition published by West Pub. Co., 1994
Seventh edition published by Routledge, 2019

Library of Congress Cataloging-in-Publication Data
Names: Tarr, G. Alan (George Alan), author.
Title: Judicial process and judicial policymaking / G. Alan Tarr.
Description: Eighth edition. | New York, NY: Routledge, 2024. |
Includes bibliographical references and index. | Summary: "An excellent introduction to judicial politics as a method of analysis, the seventh edition of Judicial Process and Judicial Policymaking focuses on policy in the judicial process. Rather than limiting the text to coverage of the U.S. Supreme Court, G. Alan Tarr examines the judiciary as the third branch of government, and weaves four major premises throughout the text: 1. Courts in the United States have always played an important role in governing and their role has increased in recent decades; 2. Judicial policymaking is a distinctive activity; 3. Courts make policy in a variety of ways; and 4. Courts may be the objects of public policy, as well as creators"— Provided by publisher.
Identifiers: LCCN 2023022661 (print) | LCCN 2023022662 (ebook) |
ISBN 9781032532240 (paperback) | ISBN 9781032575926 (hardback) |
ISBN 9781003440055 (ebook)
Subjects: LCSH: Courts—United States. | Judicial process—United States.
Classification: LCC KF8700 .T37 2024 (print) | LCC KF8700 (ebook) |
DDC 347.73—dc23
LC record available at https://lccn.loc.gov/2023022661
LC ebook record available at https://lccn.loc.gov/2023022662

ISBN: 978-1-032-57592-6 (hbk)
ISBN: 978-1-032-53224-0 (pbk)
ISBN: 978-1-003-44005-5 (ebk)

DOI: 10.4324/9781003440055

Typeset in Sabon
by Newgen Publishing UK

Access the Support Material: www.routledge.com/9781032532240

For Bob, Andy, and George

Taylor & Francis
Taylor & Francis Group
http://taylorandfrancis.com

Contents

PREFACE IX

1 Courts and Law 1

PART I **Structures and Participants in the Judicial Process 21**

2 The Federal and State Court Systems 23

3 Judges 50

4 Lawyers 91

PART II **Judicial Process and Judicial Decision Making 125**

5 Trials and Appeals 127

6 Criminal Justice and the Courts 165

7 Civil Justice and the Courts 213

8 Judicial Decision Making 241

PART III Judicial Policymaking 271
9 Judicial Policymaking: An Introduction 273
10 Federal Court Policymaking 298
11 State Court Policymaking 329

INDEX 361

Preface

The eighth edition of *Judicial Process and Judicial Policymaking*, like the seven previous editions, is designed as a basic text for courses on the judicial process, the American legal system, or law and politics. Its approach rests on four major premises.

First, courts in the United States have always played an important role in governing, and that role has increased over time. Various factors have been suggested to explain this judicial involvement in governing, including the common-law system imported from England and modified in response to American conditions and beliefs, the institution of judicial review, and the legalistic and litigious orientation of the American populace. Whatever its causes, the phenomenon of judicial participation in governing makes understanding the processes and consequences of judicial policymaking crucial for understanding U.S. government.

Second, judicial policymaking is distinctive. Judges develop public policy in the course of resolving disputes. They bring to the task of policymaking a particular training and orientation. The institutional constraints they operate under differ considerably from those of legislators or administrators. Together, these factors affect the way that judges view problems and the policies they develop; they also highlight why understanding the judicial process and the participants in it is crucial for understanding judicial policymaking. Therefore, Chapters 2 through 8 are devoted to examining the processes by which courts operate and the participants in those processes.

Third, courts make policy in a variety of ways. Sometimes, a court announces a landmark decision with national implications. More frequently, however, judicial policymaking occurs through less heralded rulings or a series of rulings. At times, this policymaking brings courts into conflict with other branches of government, as when a court strikes down a statute as unconstitutional. But often judicial policymaking complements policymaking by another branch, as when courts choose between competing understandings of the law through statutory interpretation. At other times, judicial policymaking may be altogether independent of the actions of other branches, as when judges elaborate the common law. To provide a sense of this diversity, Chapter 9 surveys the various forms of judicial policymaking, and Chapters 10 and 11 provide detailed case studies of the development and consequences of important judicial policies.

Finally, courts may be the objects of public policy, as well as its creators. Reformers have attacked various features of the administration of justice in the United States, including the insanity defense, the adversarial system, plea bargaining, and the jury system. Sometimes they have succeeded in enacting their reforms into law. Even when they have not, their criticisms require us to consider how effectively the judicial process in the United States promotes justice and what effects proposed reforms would have on the administration of justice. Throughout the book, therefore, we discuss and assess these various reform proposals. We also survey legal practices and institutions in other nations, so readers can consider how other countries have dealt with common legal problems.

The eighth edition is thoroughly updated to reflect recent developments and scholarship. Among these developments are:

- The conflicts over the blocked nomination of Merrick Garland to the U.S. Supreme Court and the appointments of Neil Gorsuch and Amy Coney Barrett to the Court (Chapter 3)
- The appointments by Presidents Donald Trump and Joseph Biden to the federal courts (Chapter 3)
- The U.S. Supreme Court's invalidation in *Ramos v. Louisiana* of non-unanimous verdicts in criminal cases (Chapter 5)
- The controversy over the Supreme Court's "shadow docket" (Chapter 5)
- The efforts to introduce bail reform and their consequences (Chapter 6)
- The use and abuse of arbitration in civil cases (Chapter 7)
- The U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* overruling *Roe v. Wade* and the legal and political aftermath of that ruling (Chapter 10)
- State court rulings on abortion post-*Dobbs* and on gerrymandering and elections post-*Rucho v. Common Cause* (Chapter 11)

Many people contributed to the completion of this project. For the eighth edition I wish to thank Leanne Hinves and Jacqueline Dorsey at Routledge, as well as several anonymous reviewers. The National Center for State Courts once again graciously permitted me to reproduce material from their invaluable trove of court statistics. For earlier editions, several reviewers provided useful comments and rescued me from errors of fact or interpretation: Lauren Bowen, John Carroll University; Paul M. Collins, Jr., University of North Texas; John C. Domino, Sam Houston State University; Philip Dynia, Loyola University (New Orleans); Margaret E. Ellis, James Madison University; Larry Elowitz, Georgia College; Sheldon Goldman, University of Massachusetts; Jona Goldschmidt, Northern Arizona University; A. J. Goubler, Delgado Community College; Roger Handberg, University of Central Florida; Mark Iris, Northwestern University; Sarah H. Ludwig, Mary Baldwin College; Christopher L. Markwood, University of Central Oklahoma; Phillip M. Simpson, Cameron University; Ken R. Stockholm, University of Alaska; Steven Tauber, University of South Florida; Richard N. Weldon, Coastal Carolina University; and Gary Young, George Washington University. Any errors that remain are, of course, solely my responsibility. Finally, I would like to thank my wife, Susan, for her loving support. This book is dedicated to my sons, Bob and Andy, and to my grandson, George.

Taylor & Francis
Taylor & Francis Group
http://taylorandfrancis.com

1

Courts and Law

Today the United States has over 1.3 million lawyers, and in 2022 117,000 more prospective lawyers were enrolled in the country's law schools. The same year, the nation's state and federal courts resolved more than 100 million cases, almost one for every three Americans. Striking as these figures are, they do not capture the full impact of law and the courts in the United States. Scan a newspaper, and you are immediately struck by how often Americans call upon judges to resolve important policy disputes. Judicial rulings affect everything from health care to conditions in jails, from the definition of marriage to the selection of the president.[1] Most judicial decisions, of course, affect only the parties to the dispute. But as the U.S. Supreme Court's rulings on school desegregation and abortion illustrate, other decisions may focus public attention on issues and encourage broad social changes.[2] Thus, courts do not merely resolve large numbers of disputes; they also actively participate in governing. So it is hardly surprising that Americans have long had a fascination with law, lawyers, and legal institutions. We closely follow publicized trials—more than 150 million Americans tuned in for the verdict in the O. J. Simpson murder case—and monitor other legal developments daily. We indulge our interest in the law through novels and movies such as *To Kill a Mockingbird* and *The Firm*, as well as television programs as different as *CSI* and *Judge Judy*. We incorporate legal terms such as "taking the Fifth" and "the right to privacy" into everyday conversations. We even tend to think about political issues from a legal perspective—witness the legal challenges to President Barack Obama's health-care law and to President Donald Trump's ban on people entering the United States from some Muslim-majority countries. Ours is truly a law-permeated society.

Often, however, our fascination with the legal order is combined with a concern about the law and American legal institutions. Thus, a

DOI: 10.4324/9781003440055-1

2022 Gallup Poll found that only 14 percent of Americans had confidence in the criminal justice system, and an historic low of 25 percent had confidence in the U.S. Supreme Court. Many Americans see courts as too lenient in their sentencing of criminals, although the percentage holding this view has declined over time, but they also (inconsistently?) believe that too many people are in prison, and they tend to favor alternatives to incarceration for those convicted of property crimes or non-violent offenses. A majority of Americans say that courts are not even-handed in dispensing justice. According to a 2014 ABC/*Washington Post* poll, 54 percent of Americans believed that blacks and other minorities do not receive equal treatment in the criminal justice system. Underlying these figures are stark racial differences in perceptions of American criminal justice. For example, following the "not guilty" verdict in the 2013 trial of George Zimmerman, a white neighborhood-watch volunteer who shot and killed Trayvon Martin, an unarmed black teenager, 51 percent of whites approved of the verdict, whereas only 9 percent of blacks and 24 percent of Hispanics did so. Popular confidence in the legal profession is also low—since 1984, the percentage of respondents voicing "a great deal of trust" in law firms has never exceeded 17 percent. Simply put, there is a perception that American legal institutions are not working well.[3]

Whether this perception is correct is, of course, a matter of dispute. This book is designed to provide readers with the information and range of perspectives they need to arrive at their own assessment. To do so, it first describes the nation's legal structures and the participants—judges, lawyers, and litigants—in the judicial process. Next, it examines the processes by which courts, from trial courts to the U.S. Supreme Court, resolve the cases that come before them and how judges reach their decisions. Finally, it surveys how courts participate in policymaking and analyzes the consequences of this judicial involvement in governing.

This book also analyzes various reform proposals, such as eliminating plea bargaining and permitting the use of illegally seized evidence at trial, so that readers may consider the likely consequences of the adoption of such reforms. In addition, it compares the legal arrangements in the United States with those in other countries. These comparisons highlight what is distinctive about the American legal system and show how other countries have dealt with legal problems similar to those in the United States.

LEGAL SYSTEMS

Legal scholars group the legal systems of the world into "legal families," based on their origins and on similarities in their laws and legal institutions (see Table 1.1).[4] The most influential families of secular legal systems, the common-law and civil-law (Romano-Germanic)

TABLE 1.1 Families of Legal Systems

Legal Family	Origins	Geographic Area	Distinguishing Feature
Common Law	England, beginning in the twelfth century	England, former English colonies, and other countries with strong political ties to England such as Australia and New Zealand. North America: the United States and Canada (with the exception of Quebec). Africa: Nigeria, Kenya, and Uganda, among others. Asia: India.	Judges decide cases through inductive reasoning, relying heavily on precedent.
Civil Law (Romano-Germanic)	European universities, during the twelfth and thirteenth centuries, which adapted the Code of Justinian to new circumstances	Most countries in continental Europe and in Latin America, as well as former French colonies in North America (Quebec and Louisiana) and the former Belgian and French colonies in Africa (e.g., Rwanda and Burundi). Some other legal systems (e.g., Algeria, Morocco, and Indonesia) contain elements of civil law and other legal traditions.	Judges decide cases through the application of legal principles, which are typically drawn from a legal code.
Socialist Law	The Soviet Union, in the aftermath of the Russian Revolution of 1917	Formerly, all communist countries in Europe, such as the Soviet Union, Albania, and Bulgaria; today, with the collapse of European communism, a few countries that continue as communist, such as Cuba and Vietnam.	Its primary objective is to move society toward communism in accordance with Marxist-Leninist theory.
Islamic Law	The founding of Islam in the sixth century	Most Muslim nations in North Africa, the Middle East, and Asia base their law, at least in part, on Islamic law.	Islamic law is religious law, understood by believers as divinely revealed and inseparable from the religion.
Hindu Law	Sacred texts known as the dharmasastras, written between 800 B.C. and A.D. 200	While Hindu law imposes obligations on all Hindus, it primarily affects the national law of India.	Hindu law is religious law, regulating virtually all aspects of life for believers.

(*Continued*)

TABLE 1.1 Families of Legal Systems (Continued)

Legal Family	Origins	Geographic Area	Distinguishing Feature
Far Eastern Law	Traditional Chinese notion of social order, exemplified by writings of Confucius (551–479 B.C.)	Historically, China, Japan, Korea, and Indochina; today, despite communism in China and Vietnam and changes in Japanese law associated with its economic development, it still influences the law in all those countries.	Far Eastern legal systems encourage the resolution of disputes by compromise, settlement, or other mechanisms rather than by the rule of law.
African Law	Custom within various African tribes	Although some African states (e.g., Senegal and Tanzania) have sought since independence to collect and codify tribal customs, the influence of those customs on the law of modern African states has been minimal.	Traditional African law stresses custom and tradition as authoritative.

families, originated in Europe. These legal systems have spread their influence throughout the world through colonialism and through the process of modernization in non-European countries. Nevertheless, many countries in Africa and Asia have also retained elements of their indigenous legal systems, and some Muslim countries have introduced religiously based Shari'a law as the foundation for their law and legal systems.

The legal system of the United States belongs to the family of common-law legal systems. So, too, do the legal systems of other former British colonies, such as Australia, India, and Nigeria. Most legal systems on the European continent belong to the civil-law family, as do the legal systems of most Latin American countries and of former French and Belgian colonies in Africa and Asia. In some countries—for instance, in Japan—the legal system defies easy categorization into a legal family, because it has derived elements from both European and American law.

The Common-Law Legal Family

Although each country within the common-law legal family has its own legal institutions and bodies of law, common-law systems resemble each other in the general organization of their courts, in the rules of evidence and procedure they employ, and in the legal doctrines they have developed. Because these features of common-law systems derive from English law and legal practice, understanding of the origins of the common law in England is crucial to understanding other common-law systems.

The Development of the Common Law The Norman conquest of England in 1066 under William the Conqueror laid the groundwork for the development of the common law. To extend royal authority over their dominion, King William's successors created permanent courts, staffed by judges appointed by the king, to administer the law of the realm. From the twelfth century onward, the English monarchs also dispatched "traveling justices" to rule in the king's name in the county courts. By the thirteenth century, the kings had succeeded in establishing a common set of legal procedures and legal standards throughout England.

But what legal procedures were the royal judges to follow in deciding cases, and what legal principles were they to employ? The judges could not rely upon parliamentary enactments for guidance—Parliament's emergence as a legislative body was still several centuries in the future. Nor could the judges rely much on royal edicts, for these did not extend to many of the legal problems confronting the judges. Rather, as William Blackstone observed in his famous treatise on the common law, the judges looked to a body of "unwritten law," the common law, for guidance.[5] In speaking of the common law as "unwritten," Blackstone was emphasizing that the doctrines of the common law, unlike legislative enactments, "are not set down in any written statute or ordinance, but depend merely upon immemorial usage." Common law was thus custom sanctioned by popular acceptance. Judges served as the "depositories of the law," and their decisions served as "the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law."[6] Thus, the common law originated in judicial decisions, which enunciated authoritative legal principles, presumably drawn from the customs and practices of the society, in the course of resolving disputes between litigants.

These judicial decisions created a body of law that judges could draw upon to resolve the cases coming before them. Referring to precedent—that is, to the judges' own earlier decisions or to those of their predecessors or colleagues—facilitated judicial decision making by giving judges standards that they could apply. Initially, "there was merely a tendency to establish a procedure, and perhaps adopt a few substantive principles which, taken together, constituted the custom of the court" and provided a standard for judicial decisions.[7] Over time, however, as the practice of publishing written reports of judicial decisions developed, judges could consult the rulings of other courts. Over time, too, the authority of these precedents increased. This was reflected in the judges' acceptance of the doctrine of *stare decisis et non quieta movere*, to stand by precedents and not to disturb settled points. Under the doctrine of *stare decisis*, common-law judges were obliged to conform their decisions to those that earlier judges reached in similar cases.

Despite the proliferation of legislation and administrative regulations over the last two centuries, judge-made law continues to play a role in common-law countries. In addition, the common law provides "a mode of treating legal problems rather than a fixed body of definite rules."[8] Thus, in dealing with statutes and other enactments, judges in common-law systems employ the same approaches to decision making, such as reliance on precedent, that they had developed for dealing with the common law. Recent legal developments therefore have not altered the basic character of common-law legal systems.

The Common Law in the United States During the seventeenth century, most colonists immigrated to North America from England, and they brought the English legal system with them. When the United States declared its independence from England, the new states retained their common-law legal systems. Thus, like their English counterparts, American judges have enunciated legal standards in the absence of legislation to resolve disputes between litigants. This in turn has guaranteed American judges a major role in lawmaking.

Nevertheless, U.S. courts modified the body of common law that they received from England. In the decades following independence, American judges expunged aspects of the common law that reflected the aristocratic character of English society and were therefore inappropriate for the more democratic society being created in the United States.[9] During the nineteenth century, American judges also adapted common-law doctrines that originated in an agrarian society to encourage economic development and accommodate industrialization.[10] Finally American judges have never viewed precedent as binding to the same extent their English counterparts have. They have been more willing to overrule earlier decisions and alter the common law in response to changing circumstances.

The Civil-Law Legal Family

A second major family of legal systems is the civil-law, or Romano-Germanic, family. Civil-law legal systems are found on the European continent, throughout South America, and in various countries in Africa and Asia. The origins of the civil law, however, can be traced to the rediscovery of Roman law during the Middle Ages in Europe.

The Rediscovery of Roman Law The creation of civil-law systems began with the intellectual revival during the twelfth and thirteenth centuries in Western Europe.[11] The founding of universities and the spread of learning during this period led to the rediscovery of the highly developed body of law that had governed ancient Rome. Collected in the Emperor Justinian's *Corpus Juris Civilis*, a systematic compilation or code of law dealing with relations between private persons, Roman law became the subject of law studies in major European universities. The study of Roman law promoted the notion that society should be governed by formal law, and it provided the vocabulary, categories, and concepts needed for the construction of a modern body of law.

This is not to say that European monarchs seized upon Roman law in order to impose it on their subjects. Because of the political fragmentation in Europe, rulers were rarely in a position to impose much law on anyone. In addition, societal changes had rendered parts of the Roman law obsolete—for example, those sections dealing with slavery. Other elements of the Roman law—for example, family law—were already dealt with by the Canon law established by the Catholic Church. As a result, the law that came to prevail in Europe also reflected local, non-Roman sources. Nevertheless, jurists and practitioners alike drew their conceptions of law, as well as their legal terminology and their approach to legal reasoning, from the tradition of Roman law.

The Napoleonic Code The influence of Roman law on civil-law systems, especially on its approach to law and legal terminology, continued from the Middle Ages to the nineteenth century. For modern civil-law systems, the decisive event was the formulation of the Napoleonic Code in 1804. This French civil code, developed by legal experts in France with Napoleon's active participation, immediately became the law in France. French conquests in Europe under Napoleon spread the code throughout the continent. Various European countries quickly developed their own codes modeled on Napoleon's, either under pressure from France or out of respect for the country's military prowess. Even after the defeat of Napoleon, his code continued to influence law throughout much of Europe, and it became the basis for legal codes in Central America and South America.

Developed in the aftermath of the French Revolution, the Napoleonic Code destroyed the remaining vestiges of feudalism and replaced them with a body of modern law. The code recognized the legal equality of all citizens, freed economic enterprise from traditional constraints, and secularized family law. Equally important, it demonstrated the advantages of systematizing the national law and provided a model for other countries.

Civil Law versus Common Law

Civil-law systems differ from their common-law counterparts in more than their historical roots.[12] Some differences involve the structure and operation of legal institutions, such as the role of judge and attorney at trial and the forms of legal procedure (discussed in Chapters 3 and 4). Others involve the characteristic source of law. In common-law systems, it is the judge, enunciating law in the course of resolving disputes. In civil-law systems, it is the legislative authority, announcing governing legal principles or, in the case of the Napoleonic Code, a more or less comprehensive body of law. Perhaps the most important difference, however, relates to what might be called the legal "frame of mind." Legal thinking in common-law systems emphasizes the concrete rather than the general and places its faith in experience rather than in abstractions. In contrast, legal thinking in civil-law systems reasons from principles to particular instances and has an inclination toward systematizing. As one commentator has put it, a civil-law system "differs from a common-law system much as rationalism differs from empiricism or deduction from induction."[13]

Yet it is easy to exaggerate the differences between these legal systems. International legal tribunals, such as the European Court of Human Rights, have no difficulty recruiting their judges from both common-law and civil-law systems and drawing upon the legal principles and practices of both. Globalization has also encouraged legal relationships spanning civil-law and common-law systems. Over time, the differences between the two systems will continue to diminish.

LAW

A speed limit is law; so, too, are wills, regulations established by the Internal Revenue Service, congressional statutes, trial court rulings, and business contracts. The length of the list—and it is hardly comprehensive—illustrates the diversity of law. To make sense of this diversity, practitioners and scholars have devised various ways of categorizing law.

Private Law and Public Law

Legal scholars often distinguish between private law and public law. This distinction is particularly important in civil-law systems, such as those in France and Argentina. Many civil-law countries have established separate sets of courts that hear only cases involving public law.

Private law is concerned with relations among private citizens, private organizations, or both. Often these private parties enter into legal agreements (contracts) to order their affairs and to prevent disputes from arising. These efforts, however, are not always effective. Disputes between tenants and landlords, between neighbors over a noisy pet, and between family members over an inheritance are all examples of private law disputes. So too are suits by consumers injured by unsafe products, by patients accusing physicians of medical malpractice, and by retailers claiming that their suppliers failed to deliver merchandise as promised. These disputes may arise out of legal obligations voluntarily assumed by the parties, as in contracts. Or the applicable law may be found in statutes or in judicial decisions. Whatever its source, in the realm of private law "the sole function of the government [is] the recognition and enforcement of private rights."[14] Table 1.2 identifies several important fields of private law. Public law, in contrast, involves relations between the government and private citizens or organizations. Thus, public law includes statutes outlawing murder or fraud, setting auto emissions standards, and taxing capital gains. It also encompasses judicial rulings protecting

TABLE 1.2 Some Categories of Private Law

Type of Law	What Does It Address?	Who Makes It?
Contract law	The enforcement of those promises for the breach of which the law provides a remedy	State law (primarily state courts through the decision of cases at common law)
Tort law	Legal wrongs committed upon a person or property, other than the breach of contract, and the award of damages for such torts	State law (primarily state common law, but more recently legislation as well)
Family law	Relationships between husband and wife and between parent and child, with the rights and duties arising from those relationships	Chiefly state legislation; also federal legislation (social welfare and taxation) and judicial rulings (e.g., abortion)
Commercial law	Aspects of business, such as the sale of goods, bank deposits, investment services, and so on	State law (especially the Uniform Commercial Code, legislation adopted by almost all legislatures)
Business law	The formation and conduct of business enterprises (corporations, partnerships, etc.)	State law primarily (e.g., incorporations), but also congressional enactments

constitutional rights, such as the freedom of speech, and administrative regulations governing airline safety.

Two major branches of public law are constitutional law and administrative law. Constitutional law is the fundamental law within a political unit, embodied in the Constitution itself and in the decisions of courts and other bodies interpreting that document. The Constitution establishes the government and prescribes how public business shall be conducted. More specifically, it creates the major offices within a government, determines how they are filled, distributes governmental power among those offices, defines the procedures by which government shall operate, and limits the scope of governmental power. The United States has 51 constitutions: the federal Constitution establishes the national government and governs its operations, and state constitutions do the same for the governments of the 50 states.

Courts in the United States, both federal and state, participate in the development of constitutional law through the exercise of judicial review. Because the U.S. Constitution is the "supreme law of the land," actions of the national or state governments that conflict with the Constitution are invalid, and persons affected by those actions can challenge them in court. Similarly, litigants may challenge state or local actions that they believe violate a state constitution. When a litigant claims that the government has acted unconstitutionally, the judge must decide whether the government has exceeded its powers or violated rights guaranteed by the Constitution. In exercising this judicial review of governmental enactments, the U.S. Supreme Court has struck down more than 160 federal statutes and more than 1100 state statutes and municipal ordinances as unconstitutional.[15]

Administrative law is concerned with the powers and procedures of governmental bodies that exercise power delegated to them by the legislature. Within the U.S. government, these bodies include government departments such as the Department of State, administrative agencies such as the Environmental Protection Agency, and independent regulatory commissions such as the Securities and Exchange Commission. These institutions establish rules and regulations that have the force of law. They also conduct hearings and adjudicate disputes that arise from such actions as the termination of welfare benefits. In addition, these institutions decide on the award or withdrawal of government grants to individuals and to communities. Finally, they control the distribution of other government benefits; for example, the broadcast licenses awarded by the Federal Communications Commission to radio and television stations. Administrative law largely deals with the processes by which public officials discharge their responsibilities and with the oversight of administrative action by the courts.

Criminal Law and Civil Law

Law can be categorized based on the relationships it regulates. The criminal law establishes which actions are offenses against society and prescribes the punishment to be imposed for such conduct. The criminal law thus is a branch of public law. The parties in a criminal case are always the government, which prosecutes the case, and the defendant charged with the criminal violation. Although they may have an interest in the outcome of a prosecution, victims of crime are not parties to the litigation. The criminal offense is understood as a violation of the public order, not as an offense against a particular person. Familiar crimes include murder, arson, fraud, and burglary.

All other law is classified as civil law. This is different from the distinction between common-law and civil-law systems discussed earlier. Civil law, in contrast to criminal law, is concerned with private rights and obligations and legal remedies when those rights are violated or those obligations are unmet. It usually involves legal relationships between private persons, organizations, or both.

Rights and obligations at civil law may arise from voluntary agreements, such as a contract between a borrower and a lender. They may also result from legislation or administrative action. A law establishing tax rates, a statute permitting victims of discrimination to sue for damages, a governmental regulation setting auto emission levels—all involve civil law. Finally, rights and obligations at civil law may be established by judicial decisions interpreting the common law. For example, if you are involved in an automobile accident because your car malfunctions, you may sue the manufacturer for damages. The obligation of manufacturers to produce safe and serviceable products—and their legal liability when they fail to do so—is established by the common law.

Substantive Law and Procedural Law

The distinction between substance and procedure, or substantive law and procedural law, cuts across the previous classifications into public law and private law, criminal law and civil law. *Substantive law* creates, defines, and delimits rights, duties, and obligations. *Procedural law*, in contrast, prescribes the processes by which those substantive rights and obligations are enforced by courts or by other public agencies.

For example, suppose you are seriously injured by a reckless driver. The substantive law determines your right to redress—whether you can obtain damages for your hospital costs, for the pain and suffering you endured, and for the loss of income caused by your hospitalization. The procedural law determines in what court you should file your complaint, what evidence can be admitted, whether you are entitled to a jury trial, and whether you have a right to appeal should the trial court rule against you.

Law and Equity

The distinction between law and equity dates from the fourteenth century in England. Parties unable to obtain satisfaction in the royal courts, often because of burdensome and inflexible procedural requirements, applied to the king for redress. As petitions for relief outside normal legal channels multiplied, the responsibility for deciding on them devolved from the monarch to the chancellor, the highest administrative official of the realm. Petitions were addressed to the chancellor directly, who would render decisions based on "the equity of the case"—that is, based on his own sense of the justice of the claim.

By the eighteenth century, the process of considering petitions for equitable relief had become institutionalized in a Court of Chancery, separate from the regular law courts and presided over by the chancellor. This court differed from the regular law courts in the flexibility of its procedures, the absence of a jury, and the broad relief it could provide. Over time, however, as volumes of Chancery decisions were published and a system of precedent was established, "the rules of law applied by the Court of Chancery [became] as much fixed by decisions and as much formed into technical legal rules as the rules of the Common Law."[16] As the Court of Chancery became more and more judicial in its decision-making, equity emerged as an alternative to—and a rival of—the law propounded by the regular law courts. This dual system of courts operated in England until the late nineteenth century. Thus, when the American colonists developed their legal systems, they adopted the dual system of courts familiar to them. Most American states merged their law courts and equity courts during the century after independence, but Mississippi and Tennessee still maintain separate courts for law and equity.

The merger of legal institutions did not eliminate equity from the U.S. legal system; it merely placed law and equity powers in the same set of hands. Thus, in interpreting a statute or awarding monetary damages in a civil case, a judge is exercising law powers. However, when a judge provides a remedy other than monetary damages—such as issuing an injunction (a legal order to a defendant to stop or start doing something)—the judge is exercising equity powers. Judicial orders that limit picketing by strikers outside a business or compel local school districts to bus children to desegregate their schools are current examples of how judges use their equity powers. These examples show that equity powers today are used primarily in devising remedies for violations of the law.

COMMON MISCONCEPTIONS ABOUT LAW AND COURTS

Misconceptions about law and the courts, as much as lack of information, prevent a full understanding of the role of courts in the United States. Often these misconceptions are half-truths, capturing part—but only part—of the reality of law and courts. Two common misconceptions are that law is a body of established rules that govern behavior and that judicial decisions on important policy issues resolve those issues.

Law and Uncertainty

In thinking of "the law," one tends to think in terms of a body of established, authoritative rules. There is some truth to this notion. Obviously, most people most of the time understand what the law requires and conform their conduct to its requirements. According to Oliver Wendell Holmes, a famous justice on the U.S. Supreme Court, this applies to bad people as well as good ones. Even bad people crave certainty about the law, so that they know how far they can go without running afoul of governmental authorities.[17]

Yet as Holmes himself recognized, not all law is clear and certain. Consider, for example, the case of *Lee v. Weisman*.[18] Robert Lee, the principal of a public middle school in Providence, Rhode Island, invited Rabbi Leslie Gutterman to give the invocation and benediction at the school's graduation. In extending the invitation, Lee was following the school district's longstanding practice of having local clergy offer prayers at the graduation ceremony. However, Daniel Weisman, a parent of one of the graduating students, objected. He claimed that the practice of prayers at graduation violated the establishment clause of the First Amendment, which requires a degree of separation between church and state.[19] Four days before graduation, Weisman filed suit in federal district court to prevent the prayers at graduation. Although Weisman's suit came too late to block the prayers at his daughter's graduation, the court agreed with his contention that religious ceremonies at public-school graduations violated the establishment clause. It issued a permanent injunction prohibiting the Providence school district from including religious ceremonies as part of future graduations. The school district appealed the decision, but both the federal court of appeals and the U.S. Supreme Court upheld the trial court's ruling.

What is striking about *Lee v. Weisman* is the nature of the dispute. Lee and Weisman agreed completely as to the facts of the case. Both acknowledged that the school had invited Rabbi Gutterman to give the invocation and benediction, that inviting clergy to offer prayers at graduation was an established practice in the district, and that students were not obliged to attend the graduation. What they disagreed about was whether the practice of having clergy lead prayers at graduation was legally permissible. More precisely, they disagreed about the meaning of the law—in this case, the establishment clause of the First Amendment—and about its application to religious ceremonies at public-school graduations. If the meaning of the establishment clause was clear and unchanging, there would have been no dispute and no litigation.

Lee v. Weisman's exclusive focus on legal rather than factual questions is hardly exceptional. Often, in cases ranging from the most highly charged constitutional conflicts to the most mundane private disputes, the issue is solely the meaning of the law and how it applies. Other cases may raise issues of fact and law simultaneously. Yet the view that litigation is aimed at defining what the law means is inconsistent with the notion that law is a set of rules whose meaning is stable and certain. Indeed, much litigation arises precisely because the meaning of the law is neither stable nor certain.

Law may be uncertain for several reasons. The language of the law may be vague or general, either by design or because of poor draftsmanship. The aims of those who enacted the law may be unclear. The situation in the case may not have been contemplated by those who enacted the law, and so on. But whatever the reason, judges must "say what the law is" to decide cases.[20] And if a case arises because the law is unclear, then judges must choose between the competing understandings of the law and of how it applies that are offered by the attorneys arguing the case. In making this choice, judges are not simply substituting certainty for uncertainty, clarity for obscurity. They are, in a very real sense, creating the law.

Of course, judges are not free to give whatever interpretation they wish to the law, to decide cases however they choose. Judges operate within legal and political constraints. For example, all judges take an oath to decide cases in accordance with the law and have been trained as to how to ascertain its meaning. Even before their elevation to the bench, they are socialized through years of legal training and experience as to the proper behavior for a judge. They also are influenced by the expectations of colleagues and lawyers. These factors affect the range of discretion judges exercise and the constraints they feel. Ultimately, however, judicial choice is channeled rather than eliminated. Because the law may be uncertain or unclear, a judicial commitment to decide cases according to the law does not eliminate judicial choice.

Courts, Law, and Public Policy

Courts in the United States often resolve disputes involving contentious public issues. Indeed, one of the most perceptive observers of American politics, Alexis de Tocqueville, suggested that "there is hardly a political question in the United States which does not sooner or later turn into a judicial one."[21] This transformation of political issues into legal disputes gives judges the chance to influence public policy. And judges have sometimes avidly seized the opportunities presented to them.

Because courts regularly decide cases that involve important policy issues, it might seem that they are in a position to dominate policymaking in the United States. But in actuality the relationship between judicial decisions and public policy is quite complex. *Regents of the University of California v. Bakke*, the U.S. Supreme Court's first ruling on affirmative action, reveals some of these complexities.[22]

Ten years after graduating from the University of Minnesota with a degree in engineering, Allan Bakke decided to become a physician. He applied to the medical school of the University of California at Davis in 1973 and again in 1974, but on both occasions he was rejected. At that time the university had a special admissions program, under which 16 seats in the entering class were reserved for minority students. This quota system was not established to remedy past discrimination by the medical school—there was no evidence that the school had discriminated—but to redress societal discrimination against minority group members. Bakke, who was white, did not qualify for admission under the program. However, his undergraduate grades and his score on the Medical College Admission Test were higher than those of some students accepted under the special admissions program. Bakke claimed that he was the victim of "reverse discrimination" and sued the university in state court, insisting that his constitutional rights had been violated.

When the U.S. Supreme Court heard Bakke's case on appeal, the justices split sharply. Four justices voted to strike down the university's affirmative action program, insisting that racial preferences in admissions were illegal. But four other justices voted to uphold the university's program and deny Bakke's appeal. Justice Lewis Powell cast the decisive vote. Powell agreed that the university had violated Bakke's rights by establishing a racial quota and denying him admission on that basis. But Powell also concluded that the Constitution did not bar affirmative action admissions programs, as long as there were no fixed quotas, even if race figured into admissions decisions.

When the Supreme Court announced its decision in *Bakke*, the case was viewed as a landmark ruling; and, in a sense, it was, for the ruling did more than compel the University of California to admit Allan Bakke to its medical school and to abandon its quota system for admitting minority group members. *Bakke* also established national policy on affirmative action in college admissions. Other universities that had instituted similar quota programs were also obliged to eliminate them to comply with the Court's ruling.

Yet *Bakke* did not resolve the issue of affirmative action. Opponents of affirmative action hailed the invalidation of the University of California's quota system and called upon other universities to abandon their race-conscious admissions programs. But proponents of affirmative action noted that the Court permitted the use of race as a factor in admissions decisions, and they urged universities to adopt more aggressive affirmative action programs consistent with the Court's ruling. Thus, instead of being converted by the Court's ruling, both opponents and proponents of affirmative action used it to buttress their own positions.

Affirmative action programs have not disappeared in the decades since *Bakke*; rather, they have expanded. Nor did the decision end conflict over affirmative action. In 1996, California voters approved an initiative (Proposition 209) to terminate affirmative action programs for hiring and admissions at the state's colleges and universities, prompting California's government to revise admission standards for the state's universities to ensure diversity within the student population. In 2003, the Supreme Court revisited the issue of affirmative action in university admissions, striking down one program at the University of Michigan but upholding another.[23] In response, Michigan voters amended their state constitution to foreclose racial preferences in admissions. And in 2023 a sharply divided Supreme Court once again addressed affirmative action in college admissions.[24] Thus, instead of establishing public policy, the Court's ruling in *Bakke* turned out to be merely one skirmish in an ongoing policy dispute.

In this respect, *Bakke* is hardly unique. Although judicial rulings may establish legal obligations, those affected by a ruling may refuse to comply with it. For example, a decade after the Supreme Court in *Brown v. Board of Education* ordered the elimination of racially segregated dual school systems, fewer than 2 percent of black children in the South were attending integrated schools. Rather than endorsing judicial rulings, public officials may ignore them, attack them, or attempt to overturn them. For instance, in the 1990s, many members of Congress pushed for a constitutional amendment to override a Supreme Court's ruling that the First Amendment protected the burning of the American flag as a form of symbolic protest.[25] Groups also may reject judicial rulings and organize to oppose them in other political arenas. One example of this is the right-to-life movement, which emerged as a national movement during the 1970s and 1980s in response to the Supreme Court's ruling in *Roe v. Wade*, which announced a constitutional right to obtain an abortion.[26] Indeed, the controversy engendered by *Roe* and by the Court's recent overruling of *Roe* suggests that judicial rulings sometimes aggravate rather than resolve policy disputes.

Taken together, these examples indicate that although courts often announce rulings on policy issues, they are seldom in a position to dictate public policy. Whether judicial rulings accomplish their objectives often depends upon, among other things, the political support they generate and the opposition they encounter. Courts do not operate outside the political process; like other governmental institutions, they are enmeshed in it.

CONCLUSIONS

This chapter has examined law and the U.S. legal system from both legal and political perspectives. From a legal perspective, probably the most important point to note about the American system is that it is a common-law legal system. As such, it shares many features with the legal systems of the United Kingdom and its other former colonies. From a political perspective, the distinctive aspect of the American legal system is the courts' involvement in policymaking. This involvement often stems from the courts' responsibility to say what the law is, even in cases with political ramifications. Thus, although courts in the United States do not dominate policymaking, their responsibilities nonetheless enmesh them in the political process.

This chapter has also explored the character of law. From a legal perspective, what is most striking are the diverse types of law that courts interpret. As we have seen, to make sense of this diversity, scholars and attorneys have categorized law in various ways: public law and private law, criminal law and civil law, law and equity, and so on. From a political perspective, what is most important is the degree of uncertainty in the law. This uncertainty in the law forms the basis for disputes and hence for litigation. It also creates opportunities for judicial discretion in interpreting the law and in deciding cases. The range of discretion that judges exercise—and the uses that they make of it—is an ongoing theme of this book. Part I, however, focuses on the structure of American legal institutions and the judges, lawyers, and litigants involved with them.

NOTES

1 On health care, see *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012); on prison conditions, see *Hudson v. McMillian*, 503 U.S. 1 (1992); on same-sex marriage, see *Obergefell v. Hodges*, 576 U.S. 644 (2015); and on the presidential election of 2000, see *Bush v. Gore*, 531 U.S. 98 (2000).

2 On school desegregation, see *Brown v. Board of Education*, 347 U.S. 483 (1954). On abortion, see *Roe v. Wade*, 410 U.S. 113 (1973), and *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ (2022). This litigation is dealt with in detail in Chapter 10.

3 Gallup Poll data are available at https://news.gallup.com/poll/1597/Confidence-Institutions.aspx. Other poll data on American criminal justice

are collected at www.pollingreport.com/crime.htm. Poll data on the performance of judges are found at "NCSC Sentencing Attitudes Survey: A Report on the Findings," at https://www.ncsc.org/~/media/Microsites/Files/CSI/The%20NCSC%20Sentencing%20Attitudes%20Survey.ashx, and discussion of trends in popular confidence in law firms is found in Neil Hamilton and Mark Jones, "A Look at Levels of Public Trust in the Professions," at www.stthomas.edu/media/hollorancenter/pdf/Minn_Lawyer_Public_T.pdf.

4 Major works analyzing contemporary legal systems include Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, 2nd rev. ed. (Oxford: Clarendon Press, 1987); Rene David and John Brierley, *Major Legal Systems in the World Today*, 3rd ed. (London: Stevens & Sons, 1985); and Glenn, H. Patrick, *Legal Traditions of the World*, 2nd ed. (New York: Oxford University Press, 2004).

5 William Blackstone, *Commentaries on the Law of England*, vol. 1 (Chicago, IL: University of Chicago Press, 1979), p. 63.

6 Ibid., p. 69.

7 Theodore F. T. Plucknett, *A Concise History of the Common Law*, 5th ed. (Boston: Little, Brown,1956), p. 342.

8 Roscoe Pound, *The Spirit of the Common Law* (Francestown, NH: Marshall Jones, 1921), p. 1.

9 William E. Nelson, *The Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830* (Cambridge, MA: Harvard University Press, 1975).

10 Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, MA: Harvard University Press, 1977).

11 David and Brierley, *Major Legal Systems*, pp. 33–59; and Alan Watson, *The Making of the Civil Law* (Cambridge, MA: Harvard University Press, 1981), chaps. 1–3.

12 Zweigert and Kötz, *Introduction to Comparative Law*, chap. 20.

13 Thomas Mackay Cooper, "The Common Law and the Civil Law—A Scot's View," *Harvard Law Review* 63 (January 1950): 470–471.

14 John H. Merryman, *The Civil Law Tradition* (Stanford, CA: Stanford University Press, 1969), p. 100.

15 For federal and state statutes invalidated by the U.S. Supreme Court, see www.govinfo.gov/.

16 Zweigert and Kötz, *Introduction to Comparative Law*, p. 195.

17 Oliver Wendell Holmes, "The Path of the Law," *Harvard Law Review* 10 (1897), quoted in *Courts, Judges, and Politics*, 2nd ed. Walter F. Murphy and C. Herman Pritchett, eds. (New York: Random House, 1974), p. 21.

18 *Lee v. Weisman*, 505 U.S. 577 (1992).

19 The establishment clause states: "Congress shall make no law respecting an establishment of religion." Originally a limitation only on the national government, the clause was made applicable to state and local governments in *Everson v. Board of Education*, 330 U.S. 1 (1947).

20 The judicial responsibility to "say what the law is" was recognized by Chief Justice John Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173 (1803).

21 Alexis de Tocqueville, *Democracy in America*, Harvey C. Mansfield and Delba Winthrop, eds. (Chicago, IL: University of Chicago Press, 2000), p. 257.

22 *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

23 *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003).

24 *Students for Fair Admissions v. President & Fellows of Harvard College*, ___ U.S. ___ (2023).

25 *Texas v. Johnson*, 491 U.S. 397 (1989).

26 *Roe v. Wade*, 410 U.S. 113 (1973), overruled by *Dobbs v. Jackson Women's Health Organization*, 598 U.S. ___ (2022).

Taylor & Francis
Taylor & Francis Group
http://taylorandfrancis.com

PART I

Structures and Participants in the Judicial Process

2 The Federal and State Court Systems 23

3 Judges 50

4 Lawyers 91

Taylor & Francis
Taylor & Francis Group
http://taylorandfrancis.com

2

The Federal and State Court Systems

On its face, the case seemed routine. Although Clarence Earl Gideon was not a professional criminal, by age 57 he had a history of run-ins with the law and had four times been convicted of minor felonies and imprisoned. Thus, when he was charged with breaking into a poolroom in Bay Harbor, Florida, with intent to commit petty larceny, it seemed merely another episode in Gideon's rather unsuccessful criminal career.[1]

Gideon was tried before a six-member jury in one of Florida's circuit (trial) courts in August 1961. At the outset of the trial, Gideon requested a lawyer be appointed to defend him, because he was too poor to hire one himself. But the judge denied Gideon's request, maintaining that neither Florida law nor the U.S. Constitution required that an attorney be provided. The trial thus proceeded with Gideon representing himself.

One prosecution witness testified he had seen Gideon leaving the poolroom carrying a pint of wine at 5:30 a.m. on the morning of the break-in. He also claimed that, looking into the poolroom, he could see that someone had removed the front of the cigarette machine and emptied its money box. The operator of the poolroom confirmed that a window had been smashed and the cigarette machine and the jukebox broken into. Gideon's cross-examination of the witnesses was unfocused and ineffectual, and he offered no explanation for why he was outside the poolroom in the early morning. The jury convicted Gideon, and Judge Robert McCrary sentenced him to five years in prison.

This, however, did not end the case. Writing from his prison cell, Gideon petitioned the Florida Supreme Court for a writ of habeas corpus, a legal order freeing him on the ground that he was illegally imprisoned. The Florida justices denied Gideon's petition, rejecting his claim that the

DOI: 10.4324/9781003440055-3

U.S. Constitution guaranteed him a right to an attorney at trial. Gideon then appealed the Florida Supreme Court's decision to the U.S. Supreme Court, requesting that the Court agree to review his case.

The Supreme Court annually receives hundreds of petitions from prisoners claiming their trials were unfair and that they should be released. Thus, Gideon's petition—four pages painstakingly printed in pencil on lined paper—was hardly unique. Most prisoner petitions lack legal merit and are dismissed by the Court, but in this instance the justices granted Gideon's petition in order to consider whether the Constitution requires states to provide a defense attorney to poor defendants in criminal cases. After receiving legal briefs and hearing oral argument from Florida's assistant attorney general and from Abe Fortas, a prominent Washington attorney appointed by the Court to represent Gideon, the justices unanimously ruled in Gideon's favor. Overruling a 20-year-old precedent, *Betts v. Brady* (1942), the Court concluded in *Gideon v. Wainwright* that the Sixth Amendment, made applicable to the states by the Fourteenth Amendment, required states to provide counsel to indigent defendants in felony cases.[2]

The Supreme Court's decision overturned Gideon's conviction but did not decide his fate. The state of Florida appointed an attorney to represent Gideon and proceeded to retry him for the break-in. But having an attorney made all the difference. Gideon's lawyer deftly undermined the credibility of the prosecution's eyewitness and, after an hour's deliberation, the jury returned a verdict of not guilty.

The story of Clarence Gideon illustrates four key aspects of the structure and operation of courts in the United States.

1. *A dual court system*. Under American federalism, each of the 50 states operates its own judicial system. So, too, does the federal government. Although the state and federal judicial systems are separate, federal and state courts can both rule on the same case. *Gideon v. Wainwright*, for example, began in a Florida state court, was appealed to the U.S. Supreme Court, and eventually was returned to a Florida trial court for resolution. Gideon's case, however, is atypical. Most cases remain in the judicial system in which they are initiated. Indeed, this might well have happened in Gideon's case. Had he not appealed the Florida Supreme Court's ruling, his case would have been resolved within the state judicial system; and if the U.S. Supreme Court had refused to review that ruling, the Florida court's decision would have been final.
2. *Separate courts performing distinct functions*. Gideon's case was considered by two different types of court, each of which played a distinct role in the resolution of the case. The Florida circuit court

served as the trial court, hearing evidence from witnesses about the facts of the case, deciding whether Gideon was guilty or not guilty, and imposing sentence following his conviction. When Gideon appealed his conviction to the Florida Supreme Court and then to the U.S. Supreme Court, the issue changed, and so too did the function of the courts. For these appellate courts, which review the rulings of lower courts, the concern was not Gideon's guilt or innocence but rather the legal correctness of the procedures under which he was convicted. Thus, when the Florida Supreme Court concluded that the trial judge had acted properly in refusing to appoint a lawyer to defend Gideon, it upheld his conviction. When the U.S. Supreme Court ruled that the judge had erred and that Gideon was entitled to a lawyer, it did not decide his guilt or innocence. Rather, it sent the case back for a new trial, at which Gideon's right to counsel was honored.

3. *Hierarchies of courts*. Not only are there various types of court, but those courts are hierarchically arranged. This means that cases follow a set path when they move from one court to another, proceeding step by step from the lowest court up the various rungs of the judicial ladder. In *Gideon*, for example, the case began in a Florida trial court, moved to the highest court in the state, and then to the nation's highest court, the U.S. Supreme Court. In addition, the hierarchical arrangement of courts reflects the authority exercised by some courts over others. Lower courts are legally obliged to abide by the rulings of higher courts. Thus, once the Supreme Court had ruled in *Gideon* that states must furnish an attorney to indigent defendants, the Florida court retrying Gideon had to comply with the ruling and appoint a lawyer to defend him.
4. *Multiple bodies of law*. Just as both the state and federal governments have their own court systems, so too each has its own body of law. It might seem logical therefore for state courts to decide cases involving state law and federal courts cases involving federal law. But the rules governing the jurisdiction of U.S. courts—that is, the types of cases a federal court is authorized to decide—are not that simple. For one thing, a single case might involve more than one body of law. Gideon, for example, was convicted of violating a Florida criminal statute in a court established by the constitution and laws of Florida. However, he claimed that the U.S. Constitution guaranteed him the right to an attorney. Thus, the Florida courts in Gideon's case had to consider both state law (the criminal statute) and federal law (the constitutional rights guaranteed to defendants in state court).

THE FEDERAL COURT SYSTEM

Structure

Although Article III of the federal Constitution establishes only the U.S. Supreme Court, it authorizes "such inferior Courts as the Congress may from time to time ordain and establish." The courts that Congress creates under Article III of the Constitution are known as constitutional courts or Article III courts; those it creates under Article I are known as legislative courts or Article I courts. Constitutional courts handle the bulk of federal litigation. The independence of their judges is secured by constitutional guarantees that the judges serve during "good behavior" and that their salaries cannot be reduced while they remain in office. By contrast, legislative courts may have administrative and quasi-legislative responsibilities, as well as judicial duties. Congressional statutes determine how long judges on legislative courts serve and whether their salaries can be reduced. Because they do not have the Article III guarantees of judicial independence, the Supreme Court has ruled that judges on legislative courts cannot be assigned the same duties and jurisdiction as judges on constitutional courts.[3] In fact, most legislative courts—for example, the U.S. Court of Military Appeals and the U.S. Tax Court—have quite specialized jurisdictions.

Figure 2.1 outlines the organization of the federal judicial system. Despite the multiplicity of courts, the structure of the federal judicial system is really quite simple; basically, it is a three-tiered structure. The

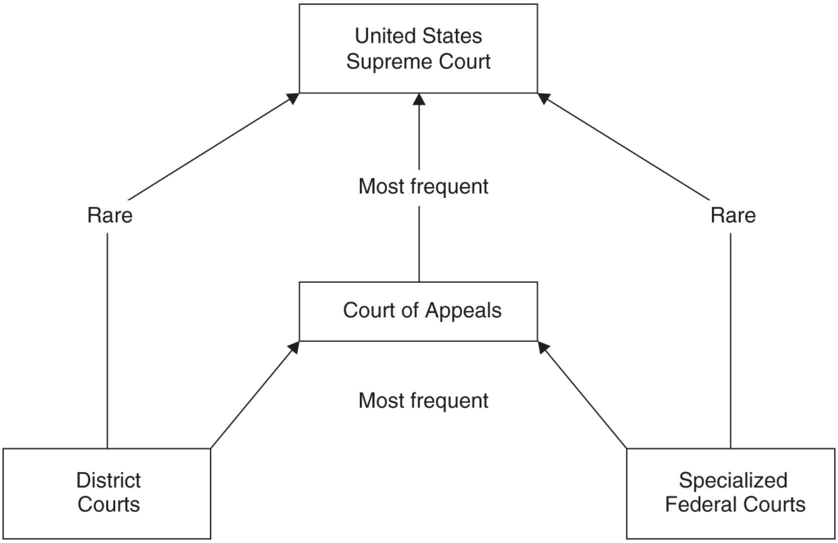


FIGURE 2.1 The Federal Court System.

most important federal courts are the constitutional courts: the district courts, the courts of appeals, and the U.S. Supreme Court. The district courts serve as the primary trial courts of the federal judicial system. Most federal cases originate in the district courts and are resolved by those courts. However, dissatisfied litigants may appeal the district courts' rulings to the courts of appeals, the first-level appellate courts. The U.S. Supreme Court is the sole second-level appellate court, the court of last resort. It hears appeals from the federal courts of appeals, from various specialized federal courts, and—when issues of federal law are involved—from state supreme courts. In rare cases, it may also hear appeals directly from federal district courts. Whereas the district courts and the courts of appeals must decide all cases properly brought before them, the Supreme Court has almost complete discretion in choosing what cases it will hear.

THE DEVELOPMENT OF THE FEDERAL JUDICIAL SYSTEM

Creation

Political conflict over the structure of the federal judicial system began at the Constitutional Convention of 1787 and has erupted periodically ever since. The delegates at the Convention agreed a national judiciary should be established, but they disagreed over its structure and organization. Some delegates wanted only a single federal court: a supreme court to review state court decisions on matters of federal concern. Other delegates, among them James Madison, distrusted state courts and insisted that federal trial courts should also be instituted. Rather than resolving the conflict, the delegates in effect postponed it. Article III of the Constitution created the Supreme Court but left the creation of additional courts up to Congress.

As its first order of business, Congress in the Judiciary Act of 1789 established the nation's judicial system. Atop the structure was the Supreme Court, consisting of six justices. The Act also provided for two tiers of federal trial courts. The 13 district courts were each staffed with a single district judge. Although the number of district courts and judges has increased, this set of federal trial courts, organized along geographic lines that do not overlap state boundaries, has survived to the present day. Less familiar is the second set of trial courts created in 1789, the three circuit courts. These courts initially had no judges of their own, operating in three-judge panels consisting, at least at the outset, of the district court judge for the district and two Supreme Court justices who "rode circuit" to hear cases.

From the outset, the circuit courts posed problems. Transportation in the new nation was primitive, and the justices found themselves riding circuit almost constantly. As early as 1792, they complained to Congress that it was "too burdensome" for them "to pass the greater part of their days on the road, and at inns, and at a distance from their families."[4] But advocates of state power opposed the creation of circuit court judges, fearing that increasing the number of federal judges would permit more cases to be routed to federal courts. When Congress finally did create circuit judges in 1801, the partisan fashion in which it acted virtually guaranteed the reform would not last. After having lost the election of 1800, President John Adams and the lame-duck Federalists who controlled Congress pushed through legislation that abolished circuit riding and created judgeships for each circuit. Adams then proceeded to appoint Federalists to all the new positions. According to legend, Adams signed the commissions for these "midnight judges" late into the last night of his presidency. Incoming president Thomas Jefferson and his Democratic-Republican Party were outraged; and in 1802, Congress—now controlled by Jefferson's party—abolished the new judgeships and reinstituted circuit riding.

Later Developments

For most of the nineteenth century, the structure of the federal judicial system remained unchanged. In 1891, Congress added a new set of courts, the circuit courts of appeals, to expand the capacity of the federal courts to hear appeals and to relieve caseload pressures on the Supreme Court. These courts, now simply called the courts of appeals, remain a vital component of the federal judicial system. In 1911, Congress completed the basic structure of the federal judicial system by abolishing the circuit (trial) courts and transferring their responsibilities to the district courts.

Since 1911, despite dramatic increases in the caseloads of federal courts, Congress has rejected fundamental changes in the structure of the federal judicial system. It has dealt with increasing caseloads by creating new district courts and appeals courts and by increasing the number of federal judges. Congress has also added various specialized courts to the federal judicial system. Some of these courts resolve cases arising under particular statutes. For example, the U.S. Tax Court, originally part of the Internal Revenue Service, was established as an independent court in 1969 and charged with deciding taxpayer challenges to income tax assessments. Other specialized courts deal with cases in a specific area of the law. The U.S. Court of Military Appeals (1950) hears appeals from court-martial convictions, and the Foreign Intelligence Surveillance Court (1978) oversees the issuance of warrants to use electronic surveillance to acquire "foreign" intelligence within the United States. The Alien Terrorist Removal Court (1996) was created in the wake of the terrorist bombing of the federal building in Oklahoma City to streamline the deportation of criminal aliens after they served their sentences.

Federal Jurisdiction

The Law of Federal Jurisdiction For a court to decide a case, the case must fall within the court's jurisdiction—that is, the range of cases it is empowered to rule on by constitutional provision or by statute. Article III of the U.S. Constitution sets the outer reaches of the federal judicial power by specifying the types of cases federal courts may be empowered to hear. Table 2.1 describes the scope of federal judicial power and explains why those types of cases were given to the federal courts.

Within these boundaries, the Constitution generally leaves it to Congress to define the jurisdiction of the various federal courts. Congress is not obliged to vest the full federal judicial power in the federal courts. Thus, federal statutes largely determine the actual division of responsibility between federal and state courts and among federal courts.

The bases for exercising federal jurisdiction are diverse and complex. The subject matter of a case, the identity of the parties to a case, or the citizenship of those parties all may provide a basis for federal courts to hear a case. For example, a job applicant may sue an employer for discrimination in federal court (1) if the statute securing the right against employment discrimination is a federal statute, or (2) if the employer is the federal government or one of its agencies, or (3) if the employer and the job applicant are citizens of different states. If the job applicant sues in a state court, and the employer and job applicant are citizens of

TABLE 2.1 The Federal Judicial Power

Article III of the U.S. Constitution defines the federal judicial power. Underlying the specific grants of power are four basic purposes:

1. **Vindicating the authority of the federal government**
   a) Cases arising under the laws of the United States
   b) Cases arising under the U.S. Constitution
   c) Cases in which the federal government is a party
2. **Maintaining the exclusive control of the federal government over foreign relations**
   a) Admiralty and maritime cases
   b) Cases arising under treaties
   c) Cases affecting ambassadors or other representatives of foreign countries
   d) Cases between states, or the citizens thereof, and foreign states, citizens, or subjects
3. **Umpiring interstate disputes**
   a) Controversies between two or more states
   b) Controversies between a state and the citizen of another state
4. **Protecting out-of-state litigants from the possible bias of local tribunals**
   a) Controversies between citizens of different states

different states, the employer can have the case transferred to a federal district court on the basis of diversity of citizenship.

The federal judicial power does not extend to all cases. When a person is charged with violating a state criminal statute, the case is heard in state court. Most criminal statutes are state statutes, and more than 98 percent of criminal prosecutions occur in state courts. State courts also have exclusive jurisdiction when a civil case involves only state law and both parties in the case are citizens of the same state. Because most civil cases have that character, they likewise are heard in state courts. Finally, the U.S. Supreme Court has held that the doctrine of sovereign immunity restricts Congress's power to authorize suits against state governments without their consent in federal courts.[5]

Congress has not required all cases arising under the federal judicial power be heard in federal court. Instead, it has allowed state courts to decide some of these cases by granting concurrent, rather than exclusive, jurisdiction to federal courts. That means that, with a few exceptions such as criminal cases based on federal statutes, cases that could be filed in federal court can be initiated in state courts as well. Lawyers can choose to file a case in the court in which they believe they have the best chance of winning or where they expect the highest awards should they prevail. Throughout the nation's history, Congress has also limited the jurisdiction of federal courts. One example is federal jurisdiction over diversity of citizenship cases. Although the Constitution permits federal courts to be assigned all cases involving a suit by a citizen of one state against the citizen of another state, Congress has restricted federal courts to those cases in which a sizable amount of money is involved. Federal courts currently hear diversity cases only when at least $75,000 is at stake.

The Politics of Federal Jurisdiction

Federalism and Federal Jurisdiction Although federal jurisdiction might seem merely a technical concern, it has at times generated intense conflict. During the nation's first century, the conflict centered on questions of federalism. Nationalists in Congress sought to enlarge federal jurisdiction, and champions of states' rights wanted to maintain the prerogatives of state courts, assuming those courts would reflect a more localist perspective.

The Judiciary Act of 1789 was a partial victory for both nationalists and states' rights advocates. Congress created lower federal courts, as the nationalists wished, but severely limited their jurisdiction. Federal district courts were vested with jurisdiction only over admiralty cases and petty crimes, those for which punishment could not exceed six months in jail, a fine of $100, or 30 stripes of whipping. Federal circuit courts, the main trial courts, could hear diversity of citizenship cases where more than $500 was at stake, major criminal cases arising under federal law, and appeals from the district courts in admiralty cases. But neither district nor circuit courts were given jurisdiction over all cases arising under federal law ("federal question" cases); thus, many of these cases were heard in state courts. Not until 1875 were federal trial courts awarded "federal question" jurisdiction.

The Judiciary Act of 1789 also circumscribed the appellate jurisdiction of the Supreme Court. The Court could not review federal court rulings in criminal cases, and it could review state rulings involving federal constitutional claims only if state judges rejected the constitutional claim and upheld the challenged state law. Underlying the second limitation was the assumption that, although state judges might be prone to favor state law against federal claims, they would be unlikely to expand federal restrictions on the governing power of their states.

The strength of states' rights forces was also manifest in a controversy that arose just four years after the passage of the Judiciary Act of 1789. In *Chisholm v. Georgia*, the Supreme Court ruled that the executor of the estate of a South Carolina citizen could sue the state of Georgia in federal court to recover payment for supplies that were sold to the state during the American Revolution.[6] The Court's decision was arguably a faithful reading of Article III of the Constitution, which authorized federal courts to hear disputes "between a state and citizens of another state." However, states rights' advocates were outraged, detecting a threat to state sovereignty. The lower house of the Georgia legislature responded by passing a bill to punish by "hanging without benefit of clergy" any person aiding in the enforcement of *Chisholm*. A more lasting response was the adoption of the Eleventh Amendment, which prohibited the federal courts from hearing suits against a state by a citizen of another state or of a foreign country.

The Impact of the Civil War After the Civil War, the issue of federal jurisdiction reemerged, but this time a nationalist perspective prevailed. Congress suspected, with good reason, that Southern courts might refuse to vindicate the rights of those newly freed from slavery. To ensure those rights were protected, it expanded the jurisdiction of the federal courts. The Habeas Corpus Act of 1867 enabled all persons in custody "in violation of the Constitution, or of any treaty or law of the United States" to seek redress in federal court. This in effect authorized federal courts to oversee state courts in criminal cases to ensure that defendants were not imprisoned in violation of federal law. The Judiciary Act of 1875 conferred on the federal courts jurisdiction in all cases involving questions of federal law and in all diversity cases where more than $500 was at stake. This ensured that those who believed their federal rights had been infringed could get a hearing before a federal judge.

Congress Versus the Courts Since the late nineteenth century, changes in federal jurisdiction have reflected either congressional dissatisfaction with judicial decisions or a concern to relieve caseload pressures on the federal courts. An example of the former is a 1914 statute empowering the Supreme Court to review all state rulings that relied on federal law. Congress's action was in response to *Ives v. South Buffalo Railway*, in which New York's supreme court ruled that the state's workmen's compensation act (the first in the nation) violated the federal Constitution.[7] Because most members of Congress favored such legislation and believed it constitutional, they wanted the Supreme Court to be able to overturn constraints placed on state legislatures by state courts. The congressional enactment ensured that state courts could not restrict state power on federal constitutional grounds further than the Supreme Court authorized.

Since the 1970s, conservatives in Congress have responded to controversial judicial rulings by proposing legislation to restrict the power of federal courts to rule on particular issues. During the 1970s and 1980s, they attempted to prevent federal courts from ruling on abortion, school prayer, and school busing, but none of the bills they introduced was enacted. Following the election of Republican majorities in both houses of Congress in 1994, however, less drastic restrictions on the jurisdiction of federal courts were approved. In 1995, Congress enacted the Prison Litigation Reform Act, which reduced the discretion of federal courts in supervising prisons and requiring the early release of prisoners. It also adopted the Effective Death Penalty Act of 1996, which limited the power of federal courts to consider petitions filed by inmates awaiting execution. With the election of Republican presidents and the appointment of more conservative judges, congressional efforts to limit the jurisdiction of federal courts dwindled. However, in the Military Commissions Act of 2006, Congress withdrew the power of federal courts to hear habeas corpus petitions challenging their detention from aliens detained as enemy combatants. The Supreme Court overturned this restriction in *Boumediene v. Bush* (2008).[8]

Caseloads and Federal Jurisdiction Concern about caseload pressures on the federal courts emerged after Congress expanded the federal courts' jurisdiction in 1875, as this created a demand for court services those courts were ill-equipped to handle. Congress alleviated caseload pressures on the Supreme Court by reducing its mandatory jurisdiction; that is, those cases it is legally obliged to hear. Until 1925, the Court had little control over which cases it decided, because Congress had awarded litigants a right of appeal to the Supreme Court. The Judges' Bill of 1925, so named because it was drafted by Chief Justice William Howard Taft and supported by the other justices, dramatically altered the Court's jurisdiction by giving the justices broad discretion in choosing their cases, thereby relieving case pressures. Since 1925, Congress has eliminated more and more of the Supreme Court's mandatory jurisdiction, so that the Court today has almost total discretion in setting its agenda.

Contraction of the Supreme Court's mandatory jurisdiction, although prompted by caseload concerns, also has affected how the Court views its responsibilities. Relieving the Court of unimportant cases has allowed it to focus on those cases crucial to the development of federal law. The justices now deliberately choose cases with that function in mind. Thus, the reform of the Court's jurisdiction has produced effects likely never contemplated by its proponents.

Congress has sought to ease caseload pressures on federal district and appeals courts by increasing the number of courts and judges. For example, the number of federal district court judges has increased from 241 in 1960 to 677 in 2023. Some scholars and jurists, most notably former Chief Justice William Rehnquist, proposed reducing the caseloads of federal district and appeals courts by eliminating their diversity-of-citizenship jurisdiction. They insist that state courts today treat residents and non-residents evenhandedly, so that the original basis for the diversity jurisdiction—avoiding bias against non-residents in state courts—no longer exists. Opposing this change have been the American Bar Association and various trial lawyers' organizations, who argue that federal courts do a better job of dispensing justice than do state courts. Thus far, these groups have blocked all efforts to curtail federal jurisdiction over diversity cases.

Although both proponents and opponents of this reform are concerned about the just and efficient operation of the federal judicial system, this is not all that is involved. Because the procedural rules in federal and state courts differ, attorneys may believe their clients would have a better chance of presenting their case or winning in one forum than in another. Some litigants seek to have their cases heard in federal court and others in state court, indicating a perception that where a case is heard makes a difference. Finally, the transfer of diversity cases to state courts would increase state court caseloads. Thus, reforms designed to promote efficiency may have other effects as well.

THE FEDERAL COURTS TODAY

The District Courts

"The people of this district either get justice here with me, or they don't get it at all. Here at the trial court—that's where the action is."[9] This

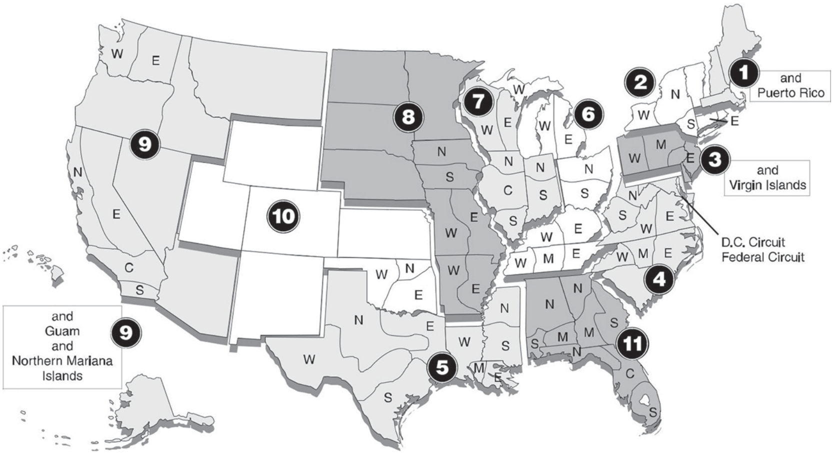


FIGURE 2.2 Map of Federal Court Districts.

SOURCE: This figure is adapted from Russell Wheeler and Cynthia Harrison, *Creating the Federal Judicial System* (Washington, D.C.: Federal Judicial Center, 1989), Figure 4. The letters and boundaries within states refer to federal court districts with states (W: West, C: Central, etc.). The circled numbers refer to federal appellate circuits.

comment by a district court judge in Iowa is no exaggeration. Most federal cases begin and end in the district courts, the primary trial courts of the federal judicial system. About 15 percent of district court rulings are appealed, but even then the district court's handling of issues affects how appellate courts view those issues. Only about 16 percent of district court rulings are reversed. Taken together, the low rates of appeal and reversal mean that fewer than 4 percent of district court judgments are ultimately overturned.

Congress has established 94 district courts, serving the 50 states, the District of Columbia, and various U.S. territories, staffed by 677 district judges. As Figure 2.2 indicates, every state has at least one district court, and no district extends beyond the borders of a single state. More populous states are divided into more than one district, with three states—California, New York, and Texas—each having four district courts.

Each district court has at least two judges. How many judges are assigned to a district court, however, depends on its caseload and thus varies from district to district. The Southern District of New York, which includes Manhattan and the Bronx, is the nation's largest with 29 district judges. By federal law, reapportionment cases and voting rights cases must be heard by three-judge panels, comprised of two district court judges and one appeals court judge. But most cases in district courts are tried before a single judge. District courts therefore hear several cases simultaneously in various courtrooms.

The Cases District courts exercise no discretion over the cases they hear. Any litigant who satisfies the jurisdictional requirements and follows proper legal procedures can initiate a case in federal district court. However, a federal district court cannot address a legal issue unless a litigant brings it before the court in a bona fide case, so litigant demand determines the business of the district courts.

In recent decades, filings in federal district courts rose sharply—from 87,421 cases in 1960 to 350,469 in 2016—but have since declined.[10] Civil filings, which represent more than three-quarters of filings in district courts, totaled 291,851 cases in 2016 but dropped to 274,771 in 2022. Filings in criminal cases totaled 75,671 in 2016, representing a decline of more than 16,000 criminal cases since 2013, and further dropped to 71,111 in 2022.

Congressional statutes and executive-branch actions affect the number and type of cases brought before district courts. In 1960, for example, only 306 civil rights cases were filed in district courts. But in succeeding decades, Congress adopted major civil rights laws, such as the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Americans with Disabilities Act of 1990. These laws encouraged victims of discrimination to seek redress in the federal courts; and the number of discrimination cases rose accordingly.

A similar pattern can be seen in criminal cases. During the 1980s, concern about the influx of cocaine and other illegal drugs into the United States led President Ronald Reagan to announce a “war on drugs” to deal with the problem. By devoting more funds and personnel to the interdiction of drugs and the enforcement of drug laws, the federal government increased the number of drug arrests and thus the number of drug cases heard in district courts. Over the decade, the criminal workload of the district courts increased 50 percent, but drug cases increased more than 270 percent. But with the end of the war on drugs, federal cases involving drug trafficking and use have declined more than 20 percent in the last decade.

Court Operations In hearing cases, district courts may operate as we have come to expect from television and novels. This means that in criminal trials the judge presides while the prosecutor and defense attorney call witnesses and introduce evidence designed to prove the guilt or innocence of the defendant. In trials in civil cases, the legal rights or obligations of the plaintiff and defendant are at issue, but the process is much the same. If it is a jury trial—and just under half of the trials in district courts are—the judge instructs the jury about the law, following the presentation of evidence and the attorneys’ closing arguments, and the jury decides the case. If there is no jury, the judge decides the case;

and when the case has a broader legal significance, the judge may write a judicial opinion explaining the reasons for the decision.

More frequently, however, cases follow a quite different pattern. Most criminal cases in federal district courts are resolved by guilty pleas, and most civil cases are resolved by a settlement between the parties following pretrial negotiations. When this occurs, no jury is selected, no witnesses are called, and no formal courtroom sessions are held except to ratify the decision reached by the parties in the case. Chapters 5–7 treat the process of litigation in district courts in greater detail.

The Courts of Appeals

The courts of appeals are the first-level appellate courts of the federal judicial system. As Figure 2.2 shows, 11 of these courts are organized regionally, with "circuits" made up of three or more states. Thus, the Fifth Circuit includes Texas, Louisiana, and Mississippi, and the Seventh Circuit includes Illinois, Indiana, and Wisconsin. The sole exception is the Court of Appeals for the Federal Circuit, which reviews large numbers of appeals from administrative agencies and serves as a sort of state supreme court for the District of Columbia. The boundaries of most circuits were established long ago and, as population shifts occurred, some courts of appeals experienced disproportionate increases in their caseloads. Congress has responded by adding judges to overburdened circuits and, as a result, the number of judges varies considerably among the courts of appeals. The First Circuit, which includes Maine, Vermont, New Hampshire, Massachusetts, and, surprisingly, Puerto Rico, has the fewest appeals court judges (six). The Ninth Circuit, which includes Alaska, Washington, Oregon, California, Nevada, Idaho, and Montana, has the most (29).

The Cases Every litigant in federal court has a right to an appeal. As a result, courts of appeals primarily engage in error correction, overseeing the work of the district courts in cases that are of interest only to the immediate parties. More than three-quarters of their cases come to courts of appeals from district courts within their circuits, the remainder coming from federal administrative agencies and from specialized courts, such as the Tax Court. The mix of cases varies from circuit to circuit. The Court of Appeals for the Second Circuit, for example, considers large numbers of banking cases because New York City, the hub of the nation's banking, is within its jurisdiction.

And because so many federal administrative agencies are located in the District of Columbia, about half the caseload of its court of appeals involves challenges to orders issued by those agencies. Like the district courts, the courts of appeals have experienced both growth and decline in their caseloads in recent decades. Indeed, the figures for the two courts are connected, because an increase in district court rulings means an increase in the number of potential appeals. In 1982, the courts of appeals heard 27,946 cases. The number rose to 58,951 in 2017 but fell to 41,839 five years later. Civil cases comprise about 83 percent of the caseloads of courts of appeals, which is consistent with the composition of the caseloads of federal district courts.

Intercourt Relations After a court of appeals decides a case, a dissatisfied litigant might appeal to the Supreme Court—about 12 percent do so. However, most litigants accept the appeals court ruling as final, and the Supreme Court generally refuses to hear most appeals. As a result, the courts of appeals have the final say in more than 99 percent of the cases they decide.

Over time, a rough division of labor has developed between the courts of appeals and the Supreme Court. As the Supreme Court became more involved in resolving constitutional disputes, it ceded primary responsibility for the interpretation of federal statutes and the supervision of administrative agencies to the courts of appeals. This poses the danger, however, that a court of appeals in one circuit might interpret a statute differently from a court of appeals in another circuit. Different interpretations of the same law would thus be authoritative in various regions of the country. What prevents this threat to the uniformity of federal law from posing a serious problem is the tendency of courts of appeals to consider the rulings of sister courts. Even if those rulings are not authoritative, they may well be persuasive. When differences in interpretation do emerge, the Supreme Court can step in to resolve the conflict. Indeed, the rules of the Supreme Court list conflict between the circuits as one of the criteria for deciding to hear cases, though the Court is not obliged to grant review even when such conflicts exist.[11]

Court Operations The courts of appeals hear more than 95 percent of their cases in three-judge panels, deciding cases by majority vote. This means that several cases can be heard simultaneously by different three-judge panels, often sitting in various cities throughout the circuit. In some cases, the judges decide solely based on the written record from the lower court and legal briefs submitted by the attorneys on each side. In particularly important cases, however, counsel for each side may present oral argument as well. When the judges have reached a decision in a case, they may announce their decision in a brief order or in a longer written opinion.

Because judges bring different perspectives to the law, the decision that an appeals court renders may depend on the composition of the panel that hears the case. Judges are rotated so that the same ones do not sit together constantly. Extraordinary efforts are made to ensure randomness in the assignment of cases to panels. For example, the Eleventh

Circuit uses a computer-generated random matrix to set the composition of every panel a year in advance.

Federal statutes also permit courts of appeals to hear cases *en banc*; that is, with the court's entire membership hearing the case together. Courts of appeals use this procedure to resolve intracircuit conflicts, when different panels within a circuit have reached conflicting results in similar cases. They also may sit *en banc* to decide particularly important cases. Each circuit has discretion to determine when an *en banc* panel is warranted.

The U.S. Supreme Court

The U.S. Supreme Court sits at the apex of the federal judicial system. It hears appeals from the federal courts of appeals, from state supreme courts, and, occasionally, from federal district courts or the Court of Military Appeals. The Constitution also assigns the Supreme Court a very limited original jurisdiction (cases it hears as a trial court), which rarely involves more than one or two cases per year. The Court exercises almost total discretion in choosing what cases it hears on appeal. Because virtually all cases coming to the Court have already been tried and have received appellate review, the justices are concerned less with correcting lower court errors than with establishing legal principles or resolving disputes that have national implications. During its 2020 Term, in marked contrast with decades earlier, fewer than half the cases the Court chose to hear raised constitutional issues.

In its 2020 Term, 5257 cases were appealed to the Supreme Court, and it granted review in only 62 cases. This represents a sharp decline from the past—in its 1987 Term, for example, the Court decided 147 cases. The change also extends to how issues reach the Court. In its 2020 Term the Court also received 77 Applications for Emergency Relief (the so-called shadow docket) and granted the relief in 24 cases. Chapter 5 describes in detail how the Court operates.

Interaction Among the Federal Courts

To get a sense of how federal courts interact, let us look at a particular controversy. On January 27, 2017, seven days after taking office, President Donald Trump signed an executive order suspending for 90 days the entry into the United States of foreign nationals from seven countries (Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen), all of which had large Muslim majorities. The order also placed a 120-day freeze on entry for refugees, although it granted an exception for those who were religious minorities in their home country (i.e., non-Muslims). Opponents of the measure immediately challenged it in federal court. The District Court for the Western District of Washington entered a temporary restraining order blocking the entry restrictions, pending a ruling on the substance of the case, and the Court of Appeals for the Ninth Circuit denied the government's request to suspend the restraining order. Rather than continue to litigate, President Trump revoked the executive order and issued a new one imposing a temporary ban on entry into the United States by foreign nationals from six of the seven countries covered in the initial executive order and suspended the entry of refugees, this time without the exception for religious minorities. This new executive order was likewise challenged. District Courts in Maryland and Hawaii issued a preliminary injunction barring enforcement of the entry restrictions, and the respective Courts of Appeals upheld these injunctions. The president appealed these rulings to the Supreme Court, which in part stayed (suspended) the injunctions. But the temporary restrictions in the second executive order expired before the Supreme Court could take more definitive action on the cases.

President Trump then issued a proclamation placing restrictions on entry into the United States of persons from eight countries. When this proclamation was challenged in District Court in Hawaii, the court ruled for the opponents of the entry restrictions, imposing an injunction barring their enforcement nationwide. On appeal, the Court of Appeals upheld the injunction in part, permitting enforcement of the ban on persons from the listed countries who lacked a preexisting relationship with the United States (such as relatives living in the country). On appeal, the Supreme Court stayed the injunction in full, pending disposition of the substance of the case. When the case was sent back to the Court of Appeals for the Ninth Circuit, it ruled that the proclamation exceeded the president's powers. But in *Trump v. Hawaii* (2018) the Supreme Court reversed the court of appeals, upholding the president's action by a 5–4 vote.[12]

The complexities of this litigation may be unusual, but they underscore the important role played by federal district courts and federal courts of appeals in even the most controversial cases. These courts are the first to address the issues, and their rulings affect what occurs later in the process. This litigation also reveals that sharp disagreements may arise among judges seeking to resolve complex legal issues. Ultimately, the U.S. Supreme Court has the final word for federal courts. But as Justice Robert Jackson acknowledged, "We are not final because we are infallible, but we are infallible only because we are final."[13]

STATE COURTS

Justice William Brennan, who served on the New Jersey Supreme Court before his elevation to the U.S. Supreme Court, once observed that "the

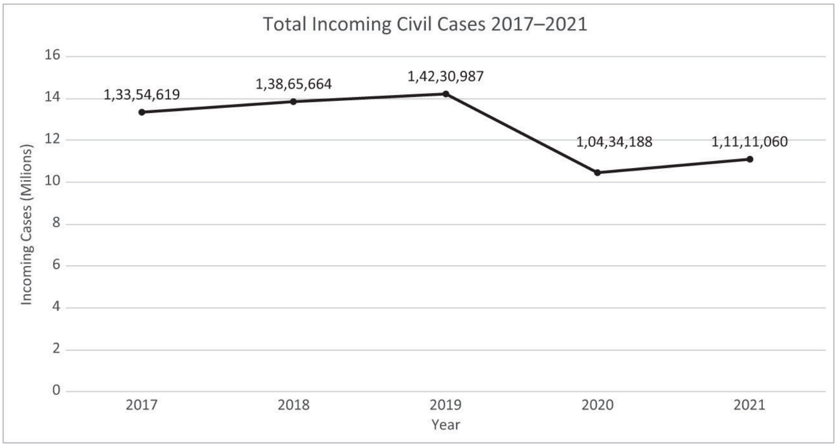


FIGURE 2.3 State Court Civil Caseloads, 2017–2021.

SOURCE: Adapted from *Court Statistics Project, National Center for State Courts*, at www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-civil (Accessed April 5, 2023).

composite work of the courts in the fifty states probably has greater significance [than that of the U.S. Supreme Court] in measuring how well America attains the ideal of equal justice for all."[14] This is true in part because of the sheer volume of cases state courts decide annually. For example, over six million cases were filed in California's trial courts in 2020, almost 20 times the number decided by federal district courts during the same year. Thus, for most Americans, their personal experience with courts—and the ideas they develop about the fairness of the nation's courts—usually involve state courts. Figures 2.3 and 2.4 show the changes over time in the caseloads of state trial courts of general jurisdiction.

State court decisions have a direct and immediate impact on the daily lives of ordinary citizens. More than 98 percent of criminal cases are state cases, arising under state criminal laws. Family matters—divorce, child custody, and adoption—and landlord–tenant relations are regulated by state law and addressed in state court. So, too, are traffic violations, creditor–debtor disputes, most personal injury suits, and most commercial transactions. Such issues not only arise in state courts but are ultimately settled by them as well. Although some state court decisions are subject to review by federal courts, most state cases fall outside the federal judicial power, because they involve disputes under state law between citizens of the same state. Even when the U.S. Supreme Court might in theory review state rulings, the sheer number of state cases means that only a minuscule

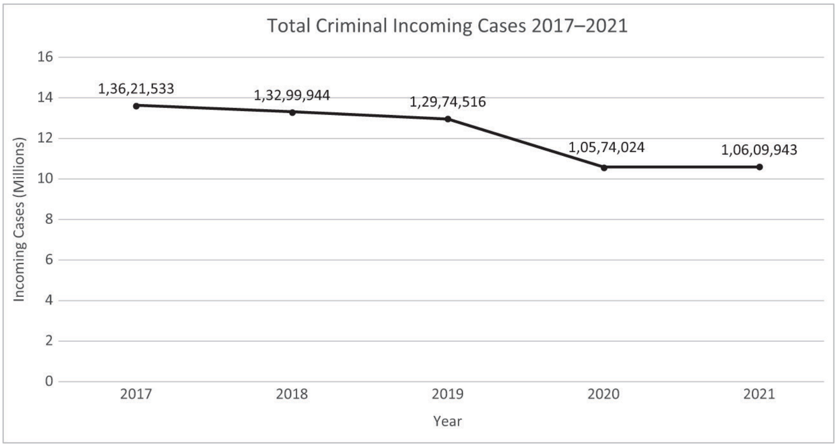


FIGURE 2.4 State Court Criminal Caseloads, 2017–2021.

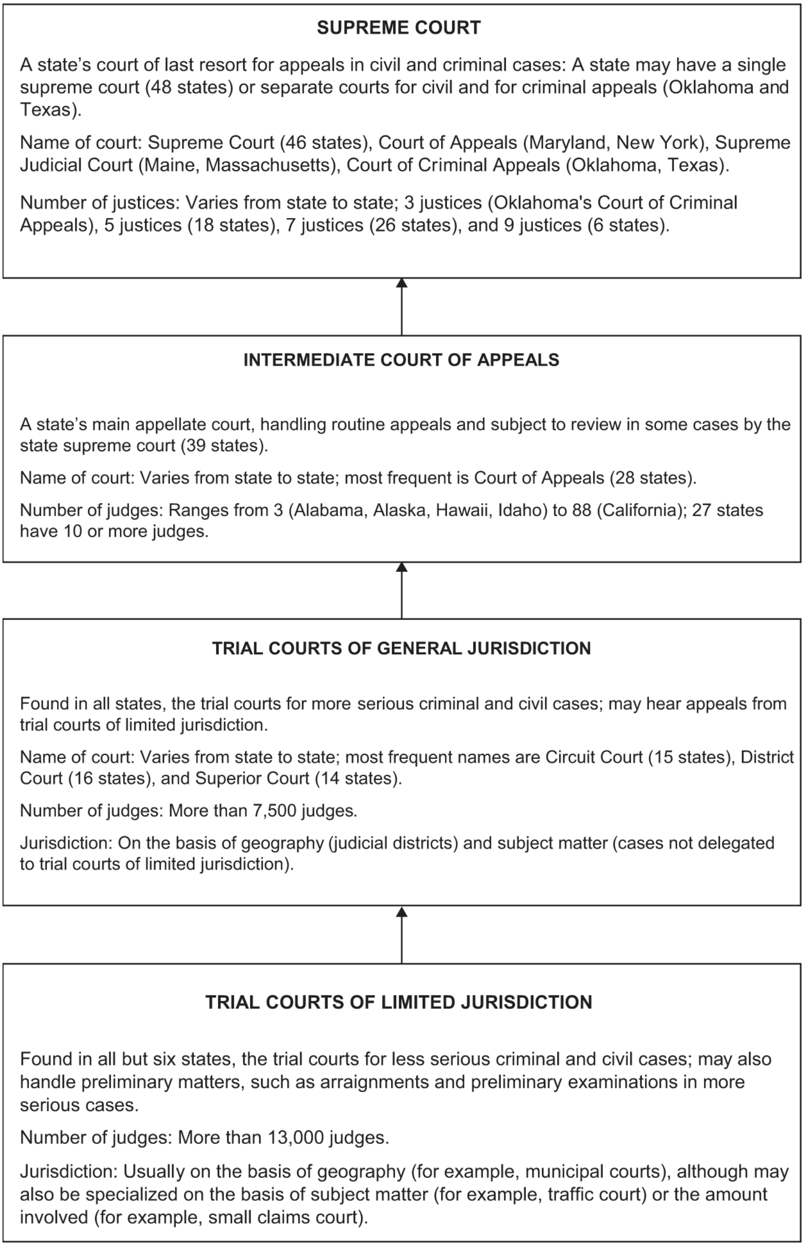
SOURCE: Adapted from *Court Statistics Project, National Center for State Courts*, at www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-criminal (Accessed April 5, 2023).

percentage actually receives federal judicial scrutiny. Thus, state courts render the final and determinative decision in almost all the cases they consider, including cases announcing major policy initiatives.

The Structure of State Court Systems

State court systems share three basic organizational features (see Figure 2.5).

1. *Supreme court.* Forty-eight states vest ultimate appellate authority in a single court, usually designated as the supreme court. (Oklahoma and Texas have each established a Court of Criminal Appeals, which is the court of last resort in criminal cases, and a Supreme Court, which has the final responsibility for appeals in civil cases.) A state supreme court is responsible for the development of state law, and its decisions serve as authoritative precedent within the state court system. Its jurisdiction is defined by the state constitution, state statutes, or both. Usually, it does not enjoy the nearly total discretion over what cases it hears that the U.S. Supreme Court does. The mandatory jurisdiction of the Washington Supreme Court, for example, includes certain criminal, administrative agency, juvenile, and lawyer-discipline cases. Not surprisingly, given the more extensive mandatory jurisdiction, most state supreme courts decide far more cases per year than the U.S. Supreme Court does.



SUPREME COURT

A state's court of last resort for appeals in civil and criminal cases: A state may have a single supreme court (48 states) or separate courts for civil and for criminal appeals (Oklahoma and Texas).

Name of court: Supreme Court (46 states), Court of Appeals (Maryland, New York), Supreme Judicial Court (Maine, Massachusetts), Court of Criminal Appeals (Oklahoma, Texas).

Number of justices: Varies from state to state; 3 justices (Oklahoma's Court of Criminal Appeals), 5 justices (18 states), 7 justices (26 states), and 9 justices (6 states).

INTERMEDIATE COURT OF APPEALS

A state's main appellate court, handling routine appeals and subject to review in some cases by the state supreme court (39 states).

Name of court: Varies from state to state; most frequent is Court of Appeals (28 states).

Number of judges: Ranges from 3 (Alabama, Alaska, Hawaii, Idaho) to 88 (California); 27 states have 10 or more judges.

TRIAL COURTS OF GENERAL JURISDICTION

Found in all states, the trial courts for more serious criminal and civil cases; may hear appeals from trial courts of limited jurisdiction.

Name of court: Varies from state to state; most frequent names are Circuit Court (15 states), District Court (16 states), and Superior Court (14 states).

Number of judges: More than 7,500 judges.

Jurisdiction: On the basis of geography (judicial districts) and subject matter (cases not delegated to trial courts of limited jurisdiction).

TRIAL COURTS OF LIMITED JURISDICTION

Found in all but six states, the trial courts for less serious criminal and civil cases; may also handle preliminary matters, such as arraignments and preliminary examinations in more serious cases.

Number of judges: More than 13,000 judges.

Jurisdiction: Usually on the basis of geography (for example, municipal courts), although may also be specialized on the basis of subject matter (for example, traffic court) or the amount involved (for example, small claims court).

FIGURE 2.5 The Structure of State Court Systems.

2. *Intermediate court of appeals.* Forty-one states have also created intermediate courts of appeals—that is, first-level appellate courts below the state supreme court. These courts focus on error correction, reviewing trial court rulings to ensure that judges did not make errors in procedure or in the interpretation of the law that would warrant reversal of their decisions. Because all litigants under American law are entitled to one appeal, these first-level appellate courts, like the federal courts of appeals, exercise no discretion over the appeals they hear. If an appeal is properly filed, they must review the lower court's decision. Decisions of an intermediate court of appeals typically can be appealed to the state supreme court, though that court may have some control over what decisions it reviews. In practice, intermediate courts of appeals render the final decision in most cases that come before them. Intermediate courts of appeals were initially established in populous states to alleviate caseload pressures on state supreme courts, but most states have now created intermediate courts of appeals. The structure and operation of these courts varies. Some sparsely populated states—for example, Alaska—have a single court that hears appeals *en banc*; that is, with all the judges sitting on each case. Other states, such as California and Louisiana, have followed the model of the federal courts of appeals, with several courts serving various regions of the state. These courts typically meet in three-judge panels, just like the federal courts of appeals. In contrast, Alabama and Tennessee have created separate courts for appeals in criminal cases and in civil cases.
3. *Trial courts.* Four states—Illinois, Iowa, Minnesota, and South Dakota—have a single set of original jurisdiction (trial) courts. The other 46 states operate two sets of trial courts: courts of limited jurisdiction and courts of general jurisdiction. Courts of limited jurisdiction go under a variety of names: municipal court, county court, district court, justice of the peace court, and so on. They handle less serious criminal cases and civil cases involving relatively small sums of money. For example, North Carolina's trial courts of limited jurisdiction, known as district courts, decide civil cases involving less than $10,000, domestic relations cases, and criminal cases involving juveniles or misdemeanors. Courts of general jurisdiction decide more important civil cases and serious criminal cases. In several states they may also hear appeals, often with a new trial—called a trial *de novo*—from courts of limited jurisdiction. This new trial is necessary because limited jurisdiction courts do not keep a verbatim record of proceedings.

Despite these commonalities, no two state court systems are exactly the same. As noted, some less populous states, such as South Dakota, route all appeals to their supreme courts, whereas most states have created intermediate courts of appeals to relieve caseload pressures on their supreme courts. The organization of state trial courts also varies. Although 46 states divide original jurisdiction between courts of limited jurisdiction and courts of general jurisdiction, many further subdivide it on the basis of geography, subject matter, or both. Thus, Maryland has a separate Orphans' Court; Colorado, a Water Court; and New York, 10 separate sets of trial courts, including special civil and criminal courts for New York City. Figure 2.6, which depicts New York's judicial system, illustrates the complexities that may result.

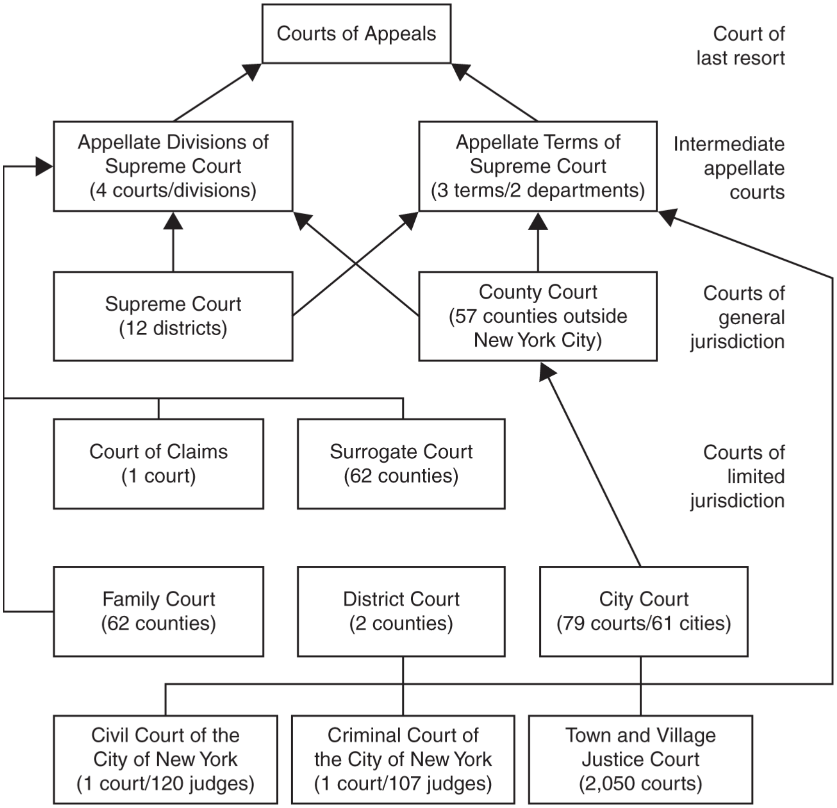

Courts of Appeals
Court of last resort
Appellate Divisions of Supreme Court (4 courts/divisions)
Appellate Terms of Supreme Court (3 terms/2 departments)
Intermediate appellate courts
Supreme Court (12 districts)
County Court (57 counties outside New York City)
Courts of general jurisdiction
Court of Claims (1 court)
Surrogate Court (62 counties)
Courts of limited jurisdiction
Family Court (62 counties)
District Court (2 counties)
City Court (79 courts/61 cities)
Civil Court of the City of New York (1 court/120 judges)
Criminal Court of the City of New York (1 court/107 judges)
Town and Village Justice Court (2,050 courts)

FIGURE 2.6 The Court System of New York.

SOURCE: Adapted from *State Court Structure Charts*, at www.courtstatistics.org/Other-Pages/State-Charts/New-York.aspx.

The Development of State Court Systems

Historical factors help explain the organizational complexity found in state court systems.[15] In creating their court systems, most states designed them to serve a relatively sparse and predominantly rural citizenry. Over time, urbanization and population growth brought new demands for court services. In some states, constitutional amendments modernized the court system, but these amendments themselves frequently were outpaced by subsequent development, requiring further changes. In other states, legislatures responded not by overhauling the existing court structure but by creating additional trial courts to satisfy demands for court services. Thus, in contrast to the federal court system, whose basic structure was largely established in 1789, state court systems reflect a continuing pattern of demand and response. Typically, new state trial courts were added with little consideration of their impact on the overall coherence of the judicial system; the result was a multiplicity of separate courts without any underlying organizational principle.

During the twentieth century, reformers introduced important changes in state court systems. One reform campaign, led by the American Judicature Society and the American Bar Association, focused on streamlining state court systems. According to reformers, the complexities of state court systems—particularly the myriad specialized trial courts with their overlapping jurisdictions—interfered with the efficient and uniform administration of justice. Litigants often did not know in which court to file suits, and the varying procedural requirements from court to court meant that cases were often dismissed on procedural grounds, without consideration of their merits. To remedy these problems, reformers proposed a consolidation of state trial courts and a clearer definition of the jurisdictional boundaries among them. (To understand the dramatic structural simplification sought by the reformers, compare New York's trial courts, depicted in Figure 2.6, with Virginia's, shown in Figure 2.7.)

During the latter half of the twentieth century, the reformers' campaign for trial court consolidation enjoyed great success. Once structural changes were adopted in a few states, such as New Jersey in 1947, other states followed their lead and simplified their systems of trial courts.

Another structural reform, the establishment of intermediate courts of appeals, was designed to address the excessive caseloads of state supreme courts. By itself, this reform did not solve the problem. Appeals from trial courts tended to increase following the establishment of an intermediate court of appeal, and appeals from that court soon deluged the state supreme court.[16] But when combined with a limitation on the right to a second appeal, the reform worked.[17] Equally important, it affected the types of cases coming before the state supreme court and the role that court played. By diverting routine cases to intermediate appellate courts,

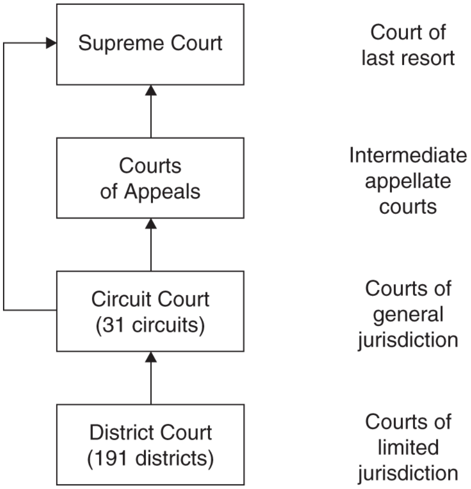

Supreme Court
Court of last resort
Courts of Appeals
Intermediate appellate courts
Circuit Court (31 circuits)
Courts of general jurisdiction
District Court (191 districts)
Courts of limited jurisdiction

FIGURE 2.7 The Court System of Virginia—A Reformed Court System.

SOURCE: Adapted from *State Court Structure Charts*, at www.courtstatistics.org/Other-Pages/State-Charts/Virginia.aspx.

states allowed their supreme courts to devote their attention to cases that raised important policy issues and to assume a position of leadership in the legal development in the state. As Chapter 11 shows, some state supreme courts have availed themselves of this opportunity to undertake major initiatives in tort law and constitutional law.

State Courts and the Great Recession of 2007–2009

State courts receive most of their funding from state governments. So when the recession that began in 2008 reduced state revenues, state governments had to reduce funding for state courts and, as a result, state courts experienced a financial crisis of their own. The result: former Chief Justice Margaret Marshall of Massachusetts described state courts as "at the tipping point of dysfunction," and Chief Justice Paul De Muniz of Oregon likened the situation to "a dying tree that you prop up in your front yard so that the landscaping looks OK."[18]

Examples from across the country confirmed the severity of the crisis. In Alabama, funding cuts forced the presiding judge in Jefferson County to ask the Birmingham Bar Foundation to donate money to help pay jurors. In New York, a $170 million cut in the courts' budget necessitated a reduction of one-half in the hours for special weekend courts in New York City, the elimination of a program to have retired judges hear backlogged cases, and the laying off of 350 court employees. And in California, a cut of $350 million in operating funds prompted a layoff of 200 superior court employees in San Francisco, leading Katherine Feinstein, the court's presiding judge, to declare that "the civil justice system in San Francisco is collapsing."[19]

Since the Great Recession ended, state tax revenues have risen, but competition for funding, popular pressures for tax cuts, and the COVID pandemic have all affected state courts. How these developments will impact the administration of justice in the states remains to be seen.

CONCLUSIONS

In choosing federalism, the United States embraced complexity in its governmental structures in general and in its courts in particular. The structure of courts in the United States, however, is complex even in comparison with judicial structures in other federal systems. Both the federal government and each state government operate a full set of trial and appellate courts. Not surprisingly, perhaps, the division of responsibility between national and state courts has remained contentious throughout the nation's history.

The structure of both the federal and state court systems has changed over time, largely in response to increases in population and in the demand for court services. For the federal courts, the changes have been less dramatic. The Judiciary Act of 1789 created the three-level structure of the federal judicial system that has continued to the present day. During the late nineteenth and early twentieth centuries, however, Congress established an entirely new set of courts, the courts of appeals, and eliminated the circuit courts. Congress also granted the Supreme Court the discretion to set its own agenda, thus facilitating its transformation into a court that deals with only the most important constitutional and other legal issues. Another recent change has been the proliferation of specialized federal courts, though most cases continue to be resolved by the federal district courts and courts of appeals.

The development of state courts has followed a different pattern. For most of the nation's history, the states responded to demands for court services by creating new courts, frequently with limited or specialized jurisdictions. Often these incremental steps provided only temporary relief and were followed by renewed demands and further piecemeal reforms. These changes over time produced unduly complex and incoherent court systems that did not function well. Thus, whereas in recent years the number of specialized federal courts has increased, judicial reformers in the states have urged the elimination of specialized courts and a return to a more simplified court structure. Many states have adopted the reformers' model, in whole or in part, and state court systems now resemble one another more closely than at any time in the past.

Some reforms—for instance, the creation of the federal courts of appeals—have undoubtedly produced a more efficient administration of justice. The verdict on others, among them state court consolidation, is less clear. What is clear, however, is that structural changes have had diverse—and at times unanticipated—effects on the role that courts play in governing.

NOTES

1 The description of this case draws on Anthony Lewis, *Gideon's Trumpet* (New York: Vintage, 1964). Gideon's handwritten petition to the Supreme Court is on display in the National Constitution Center in Philadelphia, Pennsylvania.

2 *Betts v. Brady*, 316 U.S. 455 (1942), overruled by *Gideon v. Wainwright*, 372 U.S. 335 (1963).

3 *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982).

4 David O'Brien, *Storm Center: The Supreme Court in American Politics*, 9th ed. (New York: Norton, 2011), p. 113.

5 *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

6 *Chisholm v. Georgia*, 2 Dallas 419 (1793). Although the Eleventh Amendment prohibits suing a state in federal court, it does not preclude suits against state officials. For example, Wainwright in *Gideon v. Wainwright* was the state director of corrections.

7 *Ives v. South Buffalo Railway*, 201 N.Y. 271 (1911).

8 *Boumediene v. Bush*, 553 U.S. 723 (2008).

9 Judge Henry N. Graven, quoted in C. K. Rowland and Robert A. Carp, *Politics and Judgment in Federal District Courts* (Lawrence: University Press of Kansas, 1996), p. 1.

10 Data on cases in federal district courts and courts of appeals are drawn from http://www.uscourts.gov/uscourts/statistics-reports/federal-judicial-caseload-statistics-2017-tables, and from the 2022 Year-End Report on the Federal Judiciary, at https://www.supremecourt.gov/publicinfo/year-end/2022year-endreport.pdf.

11 H. W. Perry Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Cambridge, MA: Harvard University Press, 1991), pp. 246–252.

12 *Trump v. Hawaii*, 585 U.S. ___ (2018).

13 *Brown v. Allen*, 344 U.S. 443, 540 (1953).

14 William J. Brennan, Jr., "State Supreme Court Judge Versus United States Supreme Court Justice: A Change in Function and Perspective," *University of Florida Law Review* 19 (1966): 236.

15 Larry Berkson and Susan Carbon, *Court Unification: History, Politics, and Implementation* (Washington, DC: National Institute of Law Enforcement and Criminal Justice, 1978).

16 Victor Eugene Flango and Nora F. Blair, “Creating an Intermediate Appellate Court: Does It Reduce the Caseload of a State’s Highest Court?” *Judicature* 64 (August 1980): 74–84.

17 Roger D. Groot, “The Effects of an Intermediate Appellate Court on the Supreme Court Work Product: The North Carolina Experience,” *Wake Forest Law Review* 7 (1971): 548–572.

18 Quoted in “State Courts at the Tipping Point,” *New York Times*, November 24, 2009, at http://www.nytimes.com/2009/11/25/opinion/25weds1.html; quoted in Tony Mauro, “Budget Cuts are Crippling Our Nation’s Courts,” *USA TODAY*, May 25, 2011, at http://www.usatoday.com/news/opinion/forum/2011–05–26-Budget-cuts-crippling-courts_n.htm.

19 “Passing the Hat to Help Jurors,” at http://www.gavelgrab.org/?cat=820; “More Budget Strapped Courts Face Delays,” at http://www.gavelgrab.org/?cat=828; quoted in Bob Egelko, “San Francisco Courts Warn of Budget Disaster, Huge Delays,” San Francisco Chronicle, July 19, 2011, at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/07/18/BA351KBV0G.DTL&amp;tsp=1.

3

Judges

On February 13, 2016, Antonin Scalia, the leading conservative justice on the U.S. Supreme Court, suddenly died. A month later President Barack Obama nominated Merrick Garland, chief judge of the United States Court of Appeals for the District of Columbia, to replace Scalia. Judge Garland had served on that court since his appointment by President William Clinton in 1997, when he was confirmed by a Republican-controlled Senate in a 76–23 vote, with a majority of Republican senators supporting him. Like most nominees to the Supreme Court, Garland had a distinguished resume. He was valedictorian of his class at Harvard College and graduated *magna cum laude* from Harvard Law School. Prior to his appointment to the bench, he had clerked for Supreme Court Justice William Brennan and served in the Justice Department, where he directed the government's prosecution of Timothy McVeigh and Terry Nichols for the 1994 terrorist bombing at the Federal Building in Oklahoma City.

In the Rose Garden ceremony announcing his selection, President Obama praised Judge Garland as "a nominee who is widely recognized not only as one of America's sharpest legal minds, but someone who brings to his work a spirit of decency, modesty, integrity, even-handedness, and excellence." The American Bar Association's Standing Committee on the Federal Judiciary concurred, unanimously rating Judge Garland "well-qualified" to sit on the Supreme Court, the committee's highest rating.

In his speech President Obama urged "Republicans in the Senate to give him a fair hearing, and then an up-or-down vote." This rather odd plea reflected the political maneuverings following Justice Scalia's death. Within an hour after the Supreme Court officially announced the death, Senate Majority Leader Mitch McConnell declared that the Senate would not confirm a replacement for Justice Scalia until after the 2016 election. More generally, the Senate would neither hold hearings nor vote on any

DOI: 10.4324/9781003440055-4

Supreme Court nominee proposed by President Obama during his last 11 months in office. As Senator McConnell explained, “The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new president.” President Obama demurred, claiming that the refusal even to consider a nominee was “an abdication of the Senate’s constitutional duty” which showed that the “process for nominating and confirming judges is beyond repair.” But Senate Republicans were not persuaded. Ultimately Judge Garland’s nomination expired without senatorial action on January 3, 2017, with the end of the 114th Congress.

On January 31, 2017, newly elected Republican President Donald Trump nominated Neil Gorsuch, a judge on the United States Court of Appeals for the Tenth Circuit, to succeed Justice Scalia. Like Garland, Gorsuch had a sterling resume. He had earned his undergraduate degree from Columbia University, his law degree from Harvard Law School, and his Ph.D. from Oxford University. After clerking for Supreme Court Justices Byron White and Anthony Kennedy, he spent a decade in private practice and a short stint as Deputy Associate Attorney General before being appointed by President George W. Bush in 2006 to the Court of Appeals. And, like Garland, Gorsuch received a unanimous rating of “well qualified” by the American Bar Association’s Standing Committee on the Federal Judiciary.

President Trump’s appointment of Judge Gorsuch nevertheless excited controversy. Democrats charged that he was being named to a seat that Senate Republicans had “stolen” when they refused to consider the Garland nomination. In addition, they suspected that Judge Gorsuch would align with the conservative wing of the Supreme Court, a concern made all the greater because, at age 49, he would likely serve on the Court for a long time. Finally, during confirmation hearings before the Senate Judiciary Committee, Judge Gorsuch—like nominees before him—declined to answer questions about his constitutional views, raising Democratic fears that he would seek to overturn the Court’s rulings dealing with abortion and same-sex marriage. Perhaps unsurprisingly, then, the Judiciary Committee approved Gorsuch by a narrow party-line vote (11–9).

Democratic Senators then sought to block Gorsuch’s nomination through a filibuster, extending debate in the Senate so that it could not vote on the nomination. Under the rules of the Senate, a filibuster could continue indefinitely unless 60 senators voted to cut off debate, and Democrats were confident that they had the votes to prevent that from happening. Senator Mitch McConnell, the Republican Majority Leader, condemned the filibuster “as a new low, but not entirely surprising.” But Senate Minority Leader Chuck Schumer responded that “when a nominee doesn’t get 60 votes, you shouldn’t change the rules—you should change the nominee.”

Yet change the rules was what the Senate's Republican majority did, so that a simple majority could end filibusters on Supreme Court nominations. After this change, Senate Republicans—along with four Democrats—voted to cut off debate, and the Senate confirmed Gorsuch by a 54–45 vote, with only three Democrats voting in favor of the nominee. Gorsuch was sworn in as a Justice on April 10 and immediately joined his fellow justices in hearing cases. Altogether Justice Gorsuch sat on 17 cases during the 2016 term of the Court, and in those cases he confirmed the hopes of Republicans and the fears of Democrats: in all the non-unanimous cases he voted with the majority of conservative justices, and in each he joined the same opinion as Justice Clarence Thomas, the Court's most conservative member.

The Senate's refusal to consider the Garland nomination appeared to set a precedent of not acting on Supreme Court nominations close to a presidential election, but the precedent did not last long. On September 18, 2020, less than two months before the 2020 presidential election, Justice Ruth Bader Ginsburg died. Eleven days later President Donald Trump nominated Judge Amy Coney Barrett, whom he had appointed to the United States Court of Appeals for the Seventh Circuit in 2017, to fill the vacancy on the Court. Democrats complained bitterly that the nomination was inconsistent with the precedent set just four years earlier. Senate Minority Leader Chuck Schumer derided it as a "cynical power grab," and the Democratic presidential candidate, Joe Biden, described it as "rushed and unprecedented." There was some truth to the claim: the 35 days between the nomination and the election was the shortest period ever between a Supreme Court nomination and a presidential election. But their complaints had no effect. Senate Majority Leader Mitch McConnell simply responded that "this is a tough business we are all in, and we expect to be criticized." Under his leadership the Senate expedited consideration of the nomination and, 30 days after it was announced, Judge Barrett was confirmed by a 52–48 vote in the Senate. No Democrats voted in favor.[1]

The conflict over these Supreme Court appointments illustrates three important points about judges and judicial selection.

1. *The political character of judicial selection.* The political conflict over the nominations of Garland, Gorsuch, and Barrett is hardly unique. Judges in the United States may be appointed or elected; they may be chosen by political officials, by "merit selection," or by popular vote. But no selection system altogether banishes political or ideological considerations; different selection systems may affect who exercises political influence but not whether it will be exercised.
2. *The importance of who the judges are.* Though they agreed on little else, both those who favored and those who opposed Garland,

Gorsuch, and Barrett assumed that their appointment would affect the Court's decisions. This was not because they feared—or hoped—that the new justices would cynically ignore their judicial oath of office and use the position to advance their own policy views. Rather, both sides recognized that even judges who seek to banish personal predilections and decide in accord with the law may arrive at quite different conclusions. These differences among judges may occur because judges' views and values inevitably influence their judgment, because the exercise of judgment necessarily involves an element of discretion, or for a variety of other reasons. But whatever the reason, the possibility that judges may have different perspectives on the same legal question underlines the importance of who judges.

3. *Ambiguity about judicial qualifications*. When Presidents Obama and Trump announced their Supreme Court nominees, they stressed the nominees' legal qualifications. However, Republican opponents of the Garland nomination and Democratic foes of the Gorsuch and Barrett nominations were concerned that they would shift the balance on the Court. Although presidents might criticize senators for politicizing the selection process, they too weighed their potential nominees' views before selecting them.

The conflict over the Garland, Gorsuch, and Barrett nominations reflects Americans' conflicting expectations about judges. We want judges to be independent and impartial, but we also want officials who exercise power to be responsive to public sentiment and accountable for their actions. Over the course of the nation's history, Americans have alternated between these two perspectives, as reflected in the changes over time in how state judges are selected. It is to these competing perspectives and their effect on judicial selection that we now turn.

WHAT SORTS OF JUDGES DO WE WANT?

Judicial Independence versus Accountability

Basic to our understanding of a fair trial are notions of judicial impartiality and neutrality: we believe that rulings should be unaffected by political considerations or the identity of the litigants. Yet not all legal systems share this expectation. In some, judges are expected to decide politically sensitive cases so as to further the ends of the regime. Even in systems that proclaim their commitment to "equal justice under law," officials may attempt to influence judicial decisions, and judges may sometimes succumb to political pressures. And even in the absence of overt efforts to influence decisions, judges are certainly aware of the stakes in politically sensitive cases like *Bush v. Gore*, which involved the vote count in

Florida in the aftermath of the 2000 presidential election, and *National Federation of Independent Business v. Sebelius* (2012), which concerned the constitutionality of President Obama's health-care-reform law.[2] Thus, if judges are to act impartially, they must be insulated from improper pressures to act otherwise. This freedom from external pressures is known as *judicial independence*.

Historically, pressures on judges usually involved threats to a judge's salary or position. For example, the Declaration of Independence accused George III of having made "judges dependent upon his will alone for the tenure of their offices and the amount and payment of their salaries." To forestall such pressures, Article III of the U.S. Constitution guarantees that federal judges "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office." Although most states do not safeguard judicial independence to quite that extent, they typically award longer terms of office to judges than to other officials.

The American concern for judicial independence, however, is in tension with another deeply held American value: the accountability of government officials. In democratic systems, citizens select those who wield power and hold them accountable for its exercise. This ensures that the government's decisions reflect the values and perspectives of the populace. Advocates of *judicial accountability* insist that because judges, like legislators, make decisions that have broad societal effects, they too should be held accountable for their decisions. The federal Constitution establishes a limited accountability by providing for the impeachment of judges, and eight federal judges have been convicted and removed from office, the most recent in 2010. The American states, however, have gone considerably further. Some fill judgeships by popular election and require judges to run for reelection. Almost all limit judges' terms of office and require that they periodically seek reappointment or public approval of their performance in office.

Representativeness

In recent decades, concern has also arisen about the representativeness of the judiciary—that is, the extent to which the judiciary reflects, or fails to reflect, the demographic makeup of the populace. Underlying this concern is the view that a demographically homogeneous judiciary cannot adequately take into account the perspectives and interests of excluded groups. In addition, if those who select judges fail to consider members of underrepresented groups, they are cutting themselves off from an important pool of talent. Thus concerns about outcomes and opportunities underlie the quest for representativeness.

Demographic considerations have influenced the selection of judges throughout American history. Political parties have sought to "balance the ticket" in judicial elections, and presidents and governors have considered religion and ethnicity in appointing judges. Indeed, during the early twentieth century, there were identifiable Catholic and Jewish seats on the Supreme Court. But this has changed: in 2023 there were six Catholics, two Jews, and one Protestant on the Court.

The recent pressure for a more representative judiciary has become entangled in the larger societal debate over diversity and affirmative action. Women's organizations and civil rights groups, noting the discrepancy between the proportion of group members in the population and their representation on the bench, have called for concerted action to remedy the disparity. Opponents have responded that, because judges function not as representatives but as neutral arbiters, they should be selected on the basis of merit rather than group membership. In recent decades there have been concerted efforts to diversify the federal and state judiciaries. By 2023 the justices of the Supreme Court included three women, two African Americans, and one Latina, and 41 percent of state supreme court justices were women.

The debate over representativeness, like the tension between judicial independence and accountability, reflects the competing views Americans have about judges and judging. We want judges who are impartial, yet we also want them to be mindful of community sentiment. We want a legal system free of racial and gender bias, but we disagree about whether efforts to achieve demographic representativeness promote or jeopardize equal justice for all. As Box 3.1 suggests, we also disagree about the attributes and qualities that judges should have. The chapter examines how the states and the federal government have attempted to balance these conflicting concerns for independence, accountability, and representativeness in their systems of judicial selection.

JUDICIAL SELECTION IN THE STATES

Modes of Judicial Selection

Each state establishes its own mode of judicial selection by constitutional provision or by statute (see Table 3.1).

1. *Merit selection.* This system, also called the Missouri Plan after the state in which it originated, is designed to remove politics from the selection process. It emphasizes judicial independence rather than judicial accountability. Its key feature is a judicial nominating commission, composed of lawyers selected by the state bar and nonlawyers typically appointed by the governor. When a judicial

Box 3.1 Judicial Qualifications: A Sampling of Views

> "All persons selected as judges should be of good moral character, emotionally stable and mature, physically able to discharge the duties of office, patient, courteous, and capable of deliberation and decisiveness when required to act on their own reasoned judgment."
>
> American Bar Association

> "Judges ought to be more learned than witty, more reverend than plausible, and more advised than confident."
>
> Francis Bacon, English philosopher

> "The trial judge ought to be neutral, detached, kindly, benign, reasonably learned in the law, firm but fair, wise, knowledgeable about human behavior, and in lesser respects as well, somewhat superhuman."
>
> Judge Marvin Frankel

> "The more relevant things about an appointee are his breadth of vision, his imagination, his capacity for disinterested judgment, his power to discover and suppress his prejudices."
>
> Justice Felix Frankfurter

> "It is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject."
>
> Judge Learned Hand

> "In the long run, there is no guarantee of justice except the personality of the judge."
>
> Justice Benjamin Cardozo

SOURCES: American Bar Association, *Standards Relating to Court Organization* (1990 ed.), sec. 1.21; Francis Bacon, "Of Judicature," in *Bacon's Essays*, ed. Michael J. Hawkins (London: J. M. Dent & Sons, 1972), p. 162; Marvin Frankel, "The Adversary Judge: The Experience of a Trial Judge," in *Views from the Bench*, eds. Mark W. Cannon and David M. O'Brien (Chatham, NJ: Chatham House, 1985), p. 47; Felix Frankfurter and Learned Hand, quoted in David O'Brien, *Judicial Roulette* (New York: Priority Press, 1988), p. 5; Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), p. 149.

vacancy occurs, the commission nominates three—or in some states as many as six—candidates for the position, and the governor selects the judge from that list. After a short period of service on the bench, the judge runs in an uncontested retention election, which allows voters to decide if the judge should remain in office. Twenty-two states employ merit selection for some or all of their judges.

TABLE 3.1 Judicial Selection in the States

Merit Section	Appointment by Governor	Election by Legislature	Nonpartisan Election	Partisan Election
Alaska	California (A)	South Carolina	Arizona (T)	Alabama
Arizona (M)	Maine	Virginia	Arkansas	
			California (T)	
Colorado	New Hampshire		Florida (T)	Illinois
Connecticut	New Jersey		Georgia	Indiana (T)
Delaware			Idaho	Louisiana
				New Mexico
Florida (A)			Kentucky	New York (T)
Hawaii			Maryland (T)	
Indiana (A)			Michigan	Pennsylvania
Iowa			Minnesota	Tennessee (T)
Kansas (M)			Mississippi	Texas
Maryland (A)			Montana	
Massachusetts			Nevada	
Missouri (M)			North Carolina	
			North Dakota	
Nebraska			Ohio	
			Oklahoma (T)	
New York (A)			Oregon	
Oklahoma (A)			South Dakota (T)	
Rhode Island			Washington	
			West Virginia	
South Dakota (A)			Wisconsin	
Tennessee (A)				
Utah				
Vermont				
Wyoming				

NOTE: Listings do not include trial courts of limited jurisdiction. All listings are for initial selection, not for retention or for filling vacancies occurring during a judicial term. Key for symbols following the names of states: A: appellate judges only; M: most judges, but with idiosyncratic variations; T: trial court judges only.

SOURCE: “Judicial Selection in the States,” website of the American Judicature Society, at www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=.

2. *Election by the legislature.* In Virginia and South Carolina, the legislature elects state judges. This system favors the judicial candidacies of former legislators—more than three-quarters of supreme court justices in these states have served in the state legislature.

3. *Appointment by the governor.* Governors appoint judges in four states; and in each, the state senate or another body must confirm the appointees. Thus, this system resembles the mode of selection for federal judges. Judges appointed by the governor typically serve for a set term of office. In New Jersey, for example, judges serve for seven years, after which, if reappointed by the governor and confirmed by the senate, they hold office until the retirement age of 70. In California, judges run in a retention election at the general election after their appointment and serve 12-year terms thereafter.
4. *Partisan election.* This system, now the mode of selection for some or all judges in 10 states, emphasizes judicial accountability. Political parties nominate candidates for judicial office, and they run with party labels in the general election. Once elected, they serve for terms that range from two years for Arkansas's justice courts (trial courts of limited jurisdiction) to 14 years for New York's trial courts of general jurisdiction. The judges usually must seek reelection in a partisan election, although Illinois, New Mexico, and Pennsylvania hold retention elections for incumbent judges.
5. *Nonpartisan elections.* Twenty-one states select some or all of their judges by elections conducted with no party affiliation indicated on the ballot. Typically, the top two candidates in a nonpartisan primary qualify for the general election. In some states, judges elected in nonpartisan elections run for reelection in retention elections.

No listing of modes of selection can encompass the incredible interstate and intrastate diversity. Some states use different modes of selection for judges on various courts. South Dakota, for example, uses merit selection to choose its appellate judges and nonpartisan election for trial court judges. In addition, many states permit local political authorities to select judges for some trial courts of limited jurisdiction. Some also use a different system for filling interim vacancies, such as those occurring during a judicial term because of death or resignation, than for the initial selection of judges. This can transform the system of judicial selection in a state, if most judges are initially appointed by the governor to fill judicial vacancies and then run for election as incumbents. Finally, some states that elect their judges have introduced distinctive elements to the process. For example, although Michigan and Ohio elect their judges in nominally nonpartisan elections, they nominate judicial candidates in party primaries, and so political parties play a major role in judicial elections.

What accounts for the differences in how states select their judges? In part, these differences follow a regional pattern. Gubernatorial appointment is most common in the Northeast, partisan election in the South, nonpartisan election in the northern tier of states from Michigan to Washington, and merit selection in the West. Thus, shared political values within regions of the country and the tendency to emulate the laws and institutions of neighboring states provide part of the answer.

Interstate diversity also reflects the waves of political reform that have periodically swept the nation.[3] In 1787, when the U.S. Constitution was written, all 13 states selected their judges either by gubernatorial appointment—the system used in the colonies before independence—or by legislative election. States whose legislatures now elect judges have retained that system since the late eighteenth century, and three states in which the governor appoints judges adopted that system before 1800.

During the early 1800s, many states sought to bolster their economies through speculative infrastructure projects, such as railroads and canals; and when a recession hit in the late 1830s, they found themselves vastly overextended, forcing them to default on the loans they had received. Voters in some states responded by calling constitutional conventions with the aim of restricting state legislatures, whom they blamed for the economic troubles. In order to insulate judges from party control and to encourage them to enforce constitutional limits imposed on state legislatures, the conventions decided that judges should be popularly elected. By the Civil War, 24 of the 34 states had instituted popular (partisan) election of judges, and every new state, from Iowa in 1846 to Arizona in 1912, provided for an elective judiciary. Most states that currently elect judges in partisan elections began doing so during the nineteenth century.

During the Progressive Era, reformers claimed that government would be improved by restricting the influence of partisan politics, so states instituted nonpartisan elections for judges. Merit selection, first adopted statewide in 1940 in Missouri, has replaced nonpartisan elections as the reformers' preferred approach. From 1960 to 2023, 12 states instituted merit selection, although the pace of change has slowed considerably since the 1980s. When a state changes its mode of selection, it changes the politics of judicial selection. Let us consider two main modes of judicial selection, elections and merit selection, and the politics associated with each.

The Politics of Judicial Elections

Proponents of judicial elections claim they promote judicial accountability. Critics reply that judicial elections are often uncompetitive, that they do not provide for an informed choice by voters, and that they have little or no effect on judicial behavior in office. There is considerable research assessing these claims.

Uncompetitive Elections? Electoral accountability requires that voters be offered a choice between an incumbent and a challenger or between two candidates for office. Yet critics maintain that judicial elections often are uncontested or not seriously contested. Incumbents tend to win lopsided victories and remain in office indefinitely.

Studies of nonpartisan elections confirm many of these charges. Melinda Gann Hall found that from 1980 to 1995, in states with nonpartisan judicial elections, more than half the supreme court justices running for reelection ran unopposed in their first election, and fewer than 10 percent were defeated.[4] Nonpartisan elections for trial courts were even less competitive. "Judges on the major trial courts of Ohio were opposed only 27 percent of the time, those of Michigan 26 percent of the time, and those of California only 7 percent."[5] For incumbent judges who were challenged, close races were rare and defeat even rarer.

Partisan elections for state supreme courts promote greater competition. Far fewer justices reach the state high court by interim appointment; appointed justices who run for election are almost always opposed, and about 20 percent of incumbent justices are defeated. The margin of victory and the frequency of incumbent defeat are comparable to the figures for incumbent members of the U.S. House of Representatives.[6] But the greater competitiveness of partisan elections does not extend to elections for the trial court bench. These elections tend to follow the pattern for other local elections, namely, domination by a single party. For trial court judges, therefore, nomination by the majority party is tantamount to election, and incumbent judges are rarely defeated unless they lose their party support.

An Uninformed Electorate? Electoral accountability requires that voters have not only a choice but also the information necessary to determine which candidate has the views or other qualifications they desire. Yet critics charge that judicial elections seldom promote informed choice, because the campaigns tend to be low-intensity, low-visibility affairs. Press coverage of judicial races is sparse, and financial constraints and ethical norms may prevent candidates from communicating their views to the public. As a result, voters either make uninformed choices or, recognizing their ignorance, refrain from voting in judicial elections altogether.

Many of these assertions are true. Judicial candidates rarely have sufficient funds to publicize their views. Judicial ethics prohibit them from campaigning like prospective legislators, promising to benefit particular groups, or saying how they will vote on particular issues. This, however, may be changing. The U.S. Supreme Court ruled in *Republican Party of Minnesota v. White* (2002) that the First Amendment protects the right of judicial candidates to take public positions on controversial issues, though in *Williams-Yulee v. Florida Bar* (2015) it upheld a state ban on personal solicitation of campaign funds by judicial candidates.[7]

Not surprisingly, issueless judicial campaigns attract little voter interest and make it difficult to mount a strong challenge to incumbent judges. Often, voter knowledge of candidates is woefully inadequate. Voters deal with this lack of information in various ways. In partisan elections, voters typically take their cues from the party affiliation of the candidates; thus, the vote for judges tends to reflect the partisan division in the state. In nonpartisan elections, where voters lack even that cue, voting patterns tend to be more diffuse as voters look for something—a familiar name, a newspaper endorsement, or incumbency—to differentiate among the candidates. When judicial elections are not concurrent with elections for national or statewide offices, many potential voters do not bother to turn out. When the judicial elections are concurrent, voters still may ignore the judicial races, particularly in nonpartisan systems. According to one study, 90 percent of voters going to the polls voted for judicial candidates in contested partisan elections, but only 70 percent voted for judicial candidates in contested nonpartisan elections.[8]

Yet, not all judicial elections are ill-financed, issueless endorsements of the incumbent. In fact, the cost of running for judicial office—particularly for a seat on a state supreme court—has escalated dramatically in recent years. For example, campaign spending in Alabama in 1986 on two supreme court seats was $237,281; but by 2000, candidate spending for four seats had escalated to $13,104,909. In Pennsylvania in 2015, candidates and interest groups spent $21,000,000 in campaigns for three open seats.[9]

At times, special interests have tried to buy influence on a court. While an $11 billion lawsuit by Pennzoil against Texaco was pending before the Texas Supreme Court, Texaco representatives made campaign contributions totaling $72,000 to members of the court, and Pennzoil's lawyers responded by contributing more than $315,000 to the justices. But blatant efforts to influence judicial votes through contributions are rare. More frequently, groups contribute to the campaigns of judicial candidates they believe are generally sympathetic to their views or seek to defeat candidates whose views they oppose. Thus, Citizens for a Strong Ohio, affiliated with the Ohio Chamber of Commerce, spent more than $4 million on television ads in 2000 seeking to defeat Justice Alice Resnick, while trial lawyers and union groups spent sizable sums supporting her successful reelection bid.[10]

Allegations of improprieties against a sitting judge may also whet media and voter interest and enable a challenger to upset an incumbent (see Box 3.2). A case in point occurred in West Virginia in 2008. Chief Justice Elliott Maynard finished a distant third in the Democratic primary following the publication of a photo of him vacationing on the French Riviera with Don Blankenship, the CEO of Massey Energy. Despite the close connection between Maynard and Blankenship, the chief justice

Box 3.2 Conflict in Wisconsin

Judicial elections have been aptly described as about as exciting as a game of checkers played by mail. But some judicial elections are hotly contested, with candidates and their supporters spending huge sums of money on radio and television ads attacking their opponents. Wisconsin's Supreme Court election in 2008, pitting incumbent Louis Butler against challenger Michael Gableman, illustrates this new type of judicial election.

The television visual in one Gableman commercial was striking: an image of Butler, the only African American on the Wisconsin Supreme Court, next to that of an African American man convicted of rape. So was the message: "Louis Butler worked to put criminals on the street. Like Reuben Mitchell, who raped an 11-year-old girl with learning disabilities. Butler found a loophole. Mitchell went on to rape another child." Yet the ad distorted the facts. Butler did not deal with Mitchell's case as a judge but as a public defender, when he represented Mitchell in the first rape case. Butler did convince an appellate court that the fact that the victim was a virgin should not have been admitted in evidence at trial. But this ruling was overturned by the Wisconsin Supreme Court, so Butler did not secure his client's release, and Mitchell served his sentence in prison. It was three years after his release from prison that Mitchell committed the second rape, for which he was convicted and imprisoned. The independent Judicial Integrity Campaign Committee, which monitored campaign ads, called the ad "highly offensive and deliberately misleading."

Yet the attack ads were not all on one side in the campaign. An independent group supporting Butler, the Greater Wisconsin Committee, aired a radio ad charging Gableman with ethics violations. The ad claimed that Gableman had been appointed as a judge as a payoff for campaign contributions and that, when he was district attorney, he had used his office as his campaign headquarters at the expense of taxpayers. But the group offered no evidence to support its allegations.

These and other similar ads flooded the airwaves in the weeks preceding the election—more than 4700 according to the Brennan Center for Justice. Altogether, Gableman's supporters spent $2.1 million on television ads, compared to $1.5 million by Butler's supporters. The difference may have been decisive, as Gableman defeated Butler by a narrow 51–49 percent margin. Commenting on his loss, Butler charged, "The system is broken. Third-party issue groups who don't have to be accountable, don't have to follow campaign laws, and don't have to disclose their donors siphoned huge amounts of money into this race." Whether or not this is accurate, false or misleading, negative ads are almost inevitable in hotly contested elections, and judicial elections are no exception to this rule.

SOURCES: This analysis is based on accounts by the Annenberg Public Policy Center (www.factcheck.org/elections-2008/Wisconsin_judgment_day_the_sequel.htm) and by the Justice at Stake Campaign, *The New Politics of Judicial Elections in the Great Lakes States, 2000–2008* (www.justiceatstake.org/files/NPJEGreatLakes2000-2008.FINAL.pdf).

participated in a case involving Massey Energy, joining a 3–2 majority that dismissed a lawsuit against the company by Harman Mining Company. In the primary campaign, Maynard's opponents focused on this conflict of interest, and voters denied him reelection.

No Predictable Effect on Judicial Behavior? Critics claim that judicial elections cannot influence judges' decisions, because voters have no way of knowing what cases will arise or how judges will resolve them. Furthermore, judges are bound to decide cases in accordance with the law, so elections cannot—and should not—influence their conduct in office. Although (as Chapter 8 shows) judges have some leeway in their interpretation of the law, judges who decide cases based on public opinion or political advantage violate their oath of office.

Yet even if voters in judicial elections do not directly affect the outcome of particular cases, their votes may still have an effect. The prospect of a forthcoming election may induce judges to consider community sentiments in their decisions. Research has shown that, as the time for reelection approaches, trial judges become more punitive in sentencing defendants in criminal cases.[11] Moreover, voters in judicial elections, like those in congressional elections, can select candidates whose overall orientation most closely resembles their own. When they do so, they influence the general direction of judicial decisions, even if they do not determine the outcomes in particular cases.

Judicial elections can directly affect judicial decision making only if there are competing candidates and voters can distinguish between their orientations. In nonpartisan elections, these conditions often are not met. In partisan elections, party labels serve as indicators of general orientation: Republican candidates tend to be conservative; Democratic candidates, liberal. Studies of voting behavior in state courts confirm that party affiliation is a fairly good predictor of how judges decide. Kathleen Barber has explained why:

> Direct response to the bidding of a political party is probably rare. Indirect response to needs expressed by groups in the political system with which judges have been and may still be identified is more probable. The deepest and possibly unconscious level of response reflects consonance of the values of judges and of parties with which they have been affiliated, values which predispose judges both to associate themselves with a given party and to make decisions which favor that party.[12]

The Politics of Merit Selection

Merit selection, developed as an alternative to the political selection of judges, is designed to enhance judicial independence and limit judicial accountability. Instead of party leaders or voters, a commission composed of lawyers (selected by the organized bar) and nonlawyers (usually selected by the governor) nominates prospective judges. When a judicial vacancy develops, the commission sends a short list of candidates to the governor, who must fill the vacancy from that list. Periodic retention elections, in which neither party labels nor competing candidates appear on the ballot, offer voters the opportunity to assess the incumbent's performance.

Those who originated merit selection expected that retention elections, while accommodating demands for popular involvement and serving to remove judges who had committed gross abuses, would guarantee long tenure for most judges. Critics have charged that, in practice, retention elections eliminate judicial accountability altogether. Several criticisms leveled against judicial elections in general apply with particular force to retention elections. Not many voters bother to cast ballots in retention elections. Without electoral competition, incumbents have historically enjoyed an immense advantage. From 1964 to 2014, in only 74 of 9919 retention elections were judges not retained—fewer than 1 percent of all those seeking reelection—and incumbents typically garnered more than 70 percent of the vote.[13] From 2016 to 2019, retention elections took place for 59 seats on state supreme courts, and all 59 of those judges were retained.[14]

Voters may lack even rudimentary information about the incumbent judge; for example, more than half the voters in a Wyoming retention election admitted they knew nothing at all about any of the candidates for retention.[15] Because voters in retention elections typically support incumbents unless they have a basis for opposing them, this lack of information virtually guarantees that judges will be returned to office.

Incumbents have been defeated in retention elections only when confronted by organized opposition from the legal profession, the media, interest groups, or elements of the general public. In some instances, judges have violated the law or professional norms, prompting campaigns to unseat them. One judge, for example, was defeated after consistently appearing on the bench drunk; another, after repeatedly patronizing or insulting female lawyers and witnesses in his courtroom; and a third, after using his power to assign cases to ensure that the judges deciding politically sensitive cases would be responsive to the Democratic Party.[16]

Public opposition to sitting judges may also emerge because of disagreement with judges' rulings, particularly in cases involving criminal justice and the death penalty. Perhaps the most bitterly fought retention election ever occurred in 1986, when conservative forces spent $5 million to unseat Chief Justice Rose Bird and two associate justices of the California Supreme Court because of their apparent opposition to capital punishment. But other issues may also excite opposition. In 2010, after the Iowa Supreme Court unanimously ruled that the state could not restrict marriage to opposite-sex couples, three justices who participated in the decision were defeated in retention elections.[17] The prospect of defeat in a retention election, even if unlikely, may lead judges to avoid rulings that could generate opposition. Thus, in the aftermath of the defeat of Chief Justice Bird, the reconstituted California Supreme Court upheld the death penalty in more than 95 percent of the capital cases reviewed.[18] And interviews with judges running in retention elections revealed that, as the elections approached, 15 percent sought to avoid controversial cases and rulings, and 5 percent became more conservative in sentencing in criminal cases.[19]

Whether or not merit selection guarantees accountability, its proponents maintain that it removes politics from judicial selection. In actuality, however, merit selection merely transforms the politics of judicial selection. Lawyers may be placed on the selection commission because they "have daily opportunities to observe the character and professional qualifications of their fellow lawyers seeking judicial appointment and of the judges seeking reappointment."[20] But, as Box 3.1 suggests, judicial qualifications are rather nebulous. It is easier to state minimal qualifications than full qualifications and often difficult to determine who possesses the necessary qualifications. Thus, once commission members eliminate obvious incompetents, other factors necessarily come into play. Plaintiffs' attorneys on the commission may favor members of their own group; Republicans or Democrats, fellow party members; and so on. Although selection of judges solely on the basis of qualifications may be the aim of merit selection, it is not, and cannot be, the full reality.

At one time, nonlawyer members of the selection commissions were predominantly white businessmen. But efforts to secure greater representativeness have resulted in selection commissions that more accurately reflect the states' demographic diversity. Yet, in one sense, the lay commissioners are not representative of the general populace. Appointed by the governor, they tend to reflect his or her political perspective. In fact, one-third have served in a party office, and one-quarter have held some public post.[21] As an observer in Missouri noted, "Some of the laymen are more concerned with politics than anything else, and some of them will do whatever the governor wants them to do when it comes to the selection of panels of nominees."[22]

In addition to appointing lay members of the commission, the governor may also influence the commission's deliberations by letting members know whom he or she favors for a vacant judgeship. The pressure on commission members need not be overt to be effective. Once commissioners know whom the governor wants for a position, they are unlikely to omit that person from the list of candidates unless the person is clearly unqualified. As a result, under merit selection governors may exercise almost as much control as they do under a system of gubernatorial appointment.

What Effect Do Judicial Selection Systems Have?

Underlying the debate between proponents of merit systems and advocates of judicial elections is the assumption that the mode of selection affects the decisions judges render; however, this assumption is questionable. Scholars have compared the voting patterns and decisions of judges selected by various methods. Taking similar cases in various states, some found no significant relationship between the mode of selection and judicial voting behavior. Others, focusing on how various classes of litigant (e.g., corporations, criminal defendants, and state agencies) fared before judges selected by various methods, likewise concluded that the mode of selection did not affect outcomes. But some studies have uncovered differences: appointed judges were more likely to vindicate the rights of defendants in criminal procedure cases and more likely to uphold claims of sex discrimination.[23]

Advocates of merit selection also proclaim that their system produces better-qualified judges. Given the difficulty in determining which qualifications are most important, it is impossible to test this claim directly. Scholars have therefore examined the backgrounds and characteristics of judges chosen through various modes of selection, under the assumption that these factors might serve as indicators of judicial quality. Even if they cannot, they do indicate what sorts of people become state judges under various selection systems.

WHO ARE THE STATE JUDGES?

Altogether, there are more than 1000 state appellate judges and more than 30,000 state trial judges. Because it is impossible to collect background information on so many judges, scholars have focused on state supreme court justices. What is most striking about the justices are the similarities in their backgrounds. Whatever the mode of selection, the justices have historically tended to be white, male, middle-aged, and middle- to upper-class. To some extent, this reflected the pool of candidates from which judges were chosen. The legal profession itself was hardly representative of the nation's population either demographically or economically. Most state supreme court justices have been natives of the state in which they served, attended law school there, and been active in state or local politics. Again, this is not surprising. If political considerations cannot be altogether excluded from judicial selection, then prospective judges who develop good contacts within the state and have been politically active will have an advantage. According to one judge, "Frequently judgeships become consolation prizes for those who failed in big-time elected politics."[24]

Over time, changes have occurred in the demographics of state courts. The first woman appointed to a state supreme court was Florence Allen, who served on the Ohio Supreme Court from 1922 to 1933. Another female justice was not appointed until 1958, but in recent decades the number of female justices on state supreme courts has increased dramatically. In 1980, there were only 10 female justices, but by 2022, 41 percent of the justices were women. The racial composition of state high courts has also shifted. Whereas in 1980, there was only one African American justice and no Latino justices, by 2022 18 percent of the justices were Black, Latino, Asian American, Native American, or multiracial. These changes will continue and perhaps accelerate, as previously excluded groups make up a larger proportion of the legal profession and become more influential politically.[25]

THE SELECTION OF FEDERAL JUDGES

Article II of the Constitution grants the president the power to appoint federal judges, including Supreme Court justices, with the advice and consent of the Senate. Alexander Hamilton argued in *Federalist Paper No. 76* that this system of shared responsibility has several advantages. The appointment of judges by a single person secures better judgment, imparts a greater sense of responsibility for the choice, and ensures that there will be "fewer personal attachments to gratify" in selecting judges. Senatorial confirmation of appointees serves as "an excellent check upon a spirit of favoritism in the President" and, more generally, encourages the president to appoint only highly qualified persons.

The U.S. Constitution mandates that, once selected, federal judges serve "during good behavior." Put differently, theirs is potentially a lifetime tenure. Federal judges can retire at full pay if their age and years of service add up to 80, provided that they are 65 and have been on the bench for at least 10 years. But they are not obliged to do so. For example, Judge Wesley Brown sat as a district court judge until he passed away in 2012 at the age of 104.[26] The Constitution does indicate that judges, like other public officials, are subject to impeachment. Altogether, eight federal judges have been impeached and removed from office—none of them Supreme Court justices—and three other federal judges resigned in the face of imminent impeachment. The most recent impeachment was that of Thomas Porteous, a federal district judge, who was removed in 2010 after being convicted of accepting bribes and making false statements under penalty of perjury.

The reality of federal judicial selection is more complex than the constitutional text suggests. Historically, the respective influence of the president and the Senate on selection has differed depending on the level of court, the importance the president attaches to judicial appointments, and whether a single party controls the presidency and the Senate. Members of the Senate have often played the initiating role in selecting lower court judges. When a justice of the Supreme Court is appointed, the president is actively involved. As the confirmation hearings of Robert Bork (1989), Clarence Thomas (1991), and Brett Kavanaugh (2018) have shown, however, members of the Senate can assume an adversarial stance and may conduct their own detailed investigation of the nominee's background and qualifications. Since the presidency of Bill Clinton (1993–2001), the Senate has played a key role in reviewing nominees to the courts of appeals as well.[27] Within the executive branch, the group of officials involved in selecting candidates varies according to the level of court and the wishes of the president, and the criteria used in selecting judges may also vary somewhat from administration to administration.

What does not change from administration to administration is the political character of the process. Presidents typically appoint judges who are politically active members of their own party. Merit certainly plays a role—legal competence is necessary for serious consideration—but such competence is not by itself determinative; and in the choice among qualified candidates, political considerations necessarily tip the balance.

The Size of the Federal Judiciary

Of course, for the president to appoint a judge, there must be a vacant judgeship. Vacancies can occur because of the death, retirement, or, in rare cases, impeachment of a judge. Most federal judges regard their service on the bench as the capstone of their legal careers, and few leave the bench before being required to do so by age or failing health. For justices who completed their service on the Supreme Court over the last 20 years, the average period on the bench was about 26 years, with lower court judges serving about 20 years.

Vacancies also occur when Congress creates new judgeships. Although the Supreme Court has had nine justices since 1869, caseload pressures have forced Congress to increase the number of district court and appeals court judges periodically. In fact, since the late nineteenth century, the number of federal judges has doubled approximately every 30 years.[28] As of 2023, there were 677 district court judges and 179 appeals court judges. Adding large numbers of positions at one time may alter the composition of the federal bench, and so political factors affect Congress's timing in creating new judgeships. During the 1970s, the Democratic-controlled Congress delayed adding judgeships until there was a Democratic president to appoint the judges. After the election of Jimmy Carter in 1976, Congress passed the Omnibus Judgeship Act of 1978, creating 152 new positions.

But there are limits to partisan manipulation of the size of the federal judiciary. The press of judicial business forced Democrats in Congress to expand the federal judiciary during the presidency of Ronald Reagan, and this, together with normal attrition on the federal courts, gave Reagan the opportunity to appoint 290 district court judges and 78 court of appeals judges, almost half of the federal judiciary. During Bill Clinton's presidency, he appointed 357 judges, 43 percent of the federal bench, and his successor, George W. Bush, a Republican, appointed 325 federal judges. President Barack Obama appointed 329 federal judges during his two terms in office. President Donald Trump appointed 229 during his single-term presidency, and President Biden 97 during his first two years in office.

The Selection of District Court and Appeals Court Judges

Since at least the 1840s, the selection of district court judges has reversed the constitutional prescription by lodging the primary power in the Senate. More precisely, under the system that developed during the mid-nineteenth century, power rests in the hands of the senators from the president's party in the state in which a judge is to serve. If these senators invoke senatorial courtesy, indicating their opposition to a nominee, the Senate almost invariably rejects the president's choice. This does not mean that the Senate frequently rejects nominees. Rather, the prospect of defeat in the Senate creates a powerful incentive for presidents—or, more accurately, for the officials in the Justice Department to whom the president has delegated the responsibility—to confer with the appropriate senators before selecting nominees. Usually, senators have their own candidate, or list of candidates, for the vacant seat, and the president typically endorses senators' recommendation. This means that candidates for judgeships campaign to win the support of the senators. Some senators dislike the process (according to one, "All you get out of that mess is hundreds of enemies and one ingrate"), but most view it as an important patronage opportunity.[29] Many presidents have seen the system as an opportunity to trade judgeships for senatorial support on other matters. Attorney General Robert Kennedy exaggerated only slightly when he described the process as "senatorial appointment with the advice and consent of the Senate."[30]

Senatorial courtesy influences what sort of person is appointed to the district courts. Because these judgeships serve as political patronage for senators, appointees are typically affiliated with the senator's—and the president's—political party. During the twentieth century, more than 90 percent of all district court judges were members of the appointing president's party.[31] In addition, district court judges usually have "earned" their positions by active party service before their appointment. From the point of view of prospective judges, this establishes a clear career path. As one judge put it, "If I wanted that appointment, [I knew] I had better get back into politics—which I did."[32] Because state party contacts are particularly important in securing support, this political activity has typically involved state or local, rather than national, politics. Judges therefore tend to share the political perspectives dominant in their state. This can pose a problem: in the 1950s and 1960s, for instance, many Southern district court judges were reluctant to enforce the Supreme Court's school desegregation decisions.

In selecting judges for courts of appeals, the president's power is enhanced and that of the Senate diminished. Because of the importance of the positions, the attorney general and other high-ranking officials in the Justice Department participate in identifying and screening potential nominees. Occasionally, the president himself may be involved. Because each appeals court encompasses more than one state, senators from a single state cannot control its membership. Still, a modified form of senatorial courtesy has developed, extending to the specific seats on the court that have been informally earmarked for each state in the circuit. This extra leverage for the state's senators is balanced by the greater presidential interest in these appointments, resulting in a need for negotiation and compromise.

The appeals court judges selected through this process in many ways resemble their counterparts on the district courts; indeed, many serve on district courts before being promoted to the court of appeals. Most were politically active members of the president's party before appointment; and, for much of the nation's history, presidents used appointments to these courts as a form of patronage. A perfect example is former Attorney General Griffin Bell, who served on the Fifth Circuit before resigning to head the Justice Department. In addition to his legal credentials, Bell noted he had "managed John F. Kennedy's presidential campaign in Georgia. Two of my oldest and closest friends were the two senators from Georgia. And I was the campaign manager and special, unpaid counsel for the governor."[33] In more recent years, the emphasis has shifted from patronage to ideology, with presidents nominating on the basis of judicial philosophy, and the Senate confirming or rejecting nominees on the same basis. The fact that 11 of the last 12 appointees to the Supreme Court served on federal courts of appeals immediately prior to their selection underscores the importance of who is appointed to these courts.

Positions on the courts of appeals are avidly sought, and those appointed usually have campaigned actively—though discreetly—for the office, lining up a coalition of supporters when a vacancy occurs. One judge admitted: “Anybody who thinks judicial office seeks the man is mistaken. There’s not a man on the court who didn’t do what he thought needed to be done.”[34]

A final unofficial participant in the process of selecting federal judges has been the American Bar Association (ABA) through its Standing Committee on Federal Judiciary. Beginning in the Eisenhower administration (1953–1961), presidents submitted the names of prospective judges to the committee, which investigated their professional qualifications. The committee rated nominees from “exceptionally well qualified” to “not qualified,” and nominees who received a “not qualified” rating were rarely confirmed. But during the Reagan administration, the ABA committee came under fire from political conservatives, who charged that liberals on the ABA committee were allowing their political disagreements with the Reagan administration to color their evaluations of its judicial nominees. The ABA further earned the ire of conservatives when its House of Delegates voted to endorse reproductive choice, thereby taking sides in the public debate over abortion. In response, Senate Judiciary Committee chair Orrin Hatch in 1997 decided to exclude the ABA from a privileged position in testifying on judicial nominees. In 2001, the Bush administration notified the ABA that the president would no longer submit a list of potential nominees for the organization’s rating of their professional qualifications. During the Obama administration, the ABA resumed its role of pre-screening nominees for the federal courts. However, President Trump relied instead on The Federalist Society, a conservative legal organization, to assist with identifying and screening prospective judges.

Lower Court Judges from Obama to Biden

Judicial Selection under Barack Obama (2009–2017) When President Obama was inaugurated in 2009, Democrats enjoyed a majority in the Senate. However, partisan conflict delayed confirmation of many nominees for the federal courts, as Republicans filibustered or used the threat of a filibuster in opposing his choices. In some instances, this opposition led nominees to withdraw (see Box 3.3). In other instances, there were substantial delays before judicial vacancies were filled. Yet, during the 111th Congress (2009–2010), 44 of 78 district court nominees (56 percent) and 15 of 22 appeals court nominees were confirmed. Because many of the vacancies occurred due to the resignation of judges appointed by President Clinton, the last Democratic president before Obama, these appointments did not alter the overall partisan makeup of the federal

Box 3.3 Conflict Over Liu

From Democrats' perspective, Goodwin Liu looked like an ideal candidate for a federal judgeship. He had sterling academic qualifications as a Rhodes Scholar and as a graduate of Yale Law School. He had governmental experience, having clerked for Justice Ruth Bader Ginsburg and having worked with the Department of Education and AmeriCorps during the Clinton administration before accepting a position teaching constitutional law at the University of California-Berkeley Law School. He remained politically active, serving on the boards of liberal groups such as the American Constitution Society and the National Women's Law Center. In February 2010, President Barack Obama nominated Liu to fill a vacancy on the Ninth Circuit Court of Appeals.

Some prominent Republicans, including former Independent Prosecutor Kenneth Starr, supported Liu. So did the American Bar Association committee that screens nominees for federal judgeships, giving him a "well qualified" rating. But as a Senate aide put it, Liu "was a radioactive pick. I have to believe that the White House knew there would be strenuous opposition to him." Senate Republicans charged that Liu's writings and speeches, in which he endorsed same-sex marriage and affirmative action, showed him to be a "radical" who would likely be an "activist" judge. They also charged that he lacked judicial temperament, noting his opposition to the appointments of Chief Justice Roberts and Justice Alito to the Supreme Court and his testimony that

> Judge Alito's record envisions an America where police may shoot and kill an unarmed boy to stop him from running away with a stolen purse; where federal agents may point guns at ordinary citizens during a raid, even after no sign of resistance; where a black man may be sentenced to death by an all-white jury for killing a white man, absent [an] analysis showing discrimination, is not the America we know. Nor is it the America we aspire to be.

Finally, Republicans objected to his age—Liu was 39 at the time he was nominated by President Obama. In part, the concern was Liu's lack of legal experience, but Republicans also worried that, if Liu was confirmed, in a few years he would be a plausible appointee to the Supreme Court.

Although Democrats had a majority in the Senate, Republicans mounted a filibuster, refusing to allow the nomination to come to a vote. In order to invoke cloture and end the filibuster, those supporting Liu's nomination needed 60 votes; and when the cloture motion came to a vote, they fell eight votes short. With no further action on his nomination likely, Liu withdrew his name from consideration. Two months after he did so, Liu was appointed to the California Supreme Court by Governor Jerry Brown, where he now serves.

Liu was the first Obama nominee to be successfully filibustered by the Senate, but his was hardly a unique case. Because of Republican opposition, hearings and votes on several other Obama nominees were also delayed. These stalling tactics were not a Republican invention. During his last two years in office, when Democrats had regained a majority in the Senate, several of President George W. Bush's nominees were either denied a hearing by the Senate Judiciary Committee or filibustered on the floor of the Senate. Altogether, only 10 Bush appellate nominees were confirmed in 2007–2008, and 11 seats for which the president had nominated candidates remained vacant at the end of his term of office. When questioned about this, Democrats replied that Republicans had blocked President Clinton's judicial nominees during his last years in office. What is clear is that increasing partisan and ideological differences between the Republican and Democratic parties have intensified conflict over federal judicial nominations.

SOURCES: James Oliphant, "GOP Blocks Judicial Appointment," *Los Angeles Times*, May 20, 2011, at http://articles.latimes.com/2011/may/20/nation/la-na-goodwin-liu-20110520; and Sheldon Goldman, Elliot Slotnick, and Sara Schiavoni, "A Tale of Two Nominees: David Hamilton and Gordon Liu," *Judicature* 94 (May–June 2011): 282–285.

bench, even though the president appointed no Republicans. What did change was the demographic makeup of the federal courts: President Obama made a major effort to increase the diversity of the federal judiciary. Altogether he appointed 55 court of appeals judges and 268 district court judges, as well as four judges to the U.S. Court of International Trade. Of these, 62 were African Americans, 31 Latinos, and 18 Asian-Americans, and 42 percent of his appointees were women, including both his Supreme Court appointees, Sonia Sotomayor and Elena Kagan.[35]

Judicial Selection under Donald Trump (2017–2021) During his administration, President Trump benefited from having a Republican majority in the Senate eager to confirm his judicial appointees. In choosing who should sit on the bench, he relied heavily on The Federalist Society, a conservative legal organization, so most of his appointees were judicial conservatives. During his presidency, he appointed three Supreme Court justices (Neal Gorsuch, Brett Kavanaugh, and Amy Coney Barrett), 54 court of appeals judges, and 177 district court judges. His four-year appointment total exceeded that of any previous president and had a dramatic effect on the partisan composition of the federal courts. For example, when he assumed office in 2017, only 40 percent of court of appeals judges had been appointed by Republican presidents; by the time he left office, the percentage of Republican appointees had risen to 54 percent.

President Trump's appointees were less diverse than those made by Obama. Trump appointed 55 female judges (24 percent of his total appointees) and 37 nonwhite judges (16 percent of his total).[36]

Judicial Selection Under Joseph Biden (2021–2022) As of February 13, 2023, President Biden had appointed 98 Article III judges—one Supreme Court justice (Ketanji Brown Jackson), 28 court of appeals judges, and

68 district court judges. When nominating Jackson as a justice, Biden stated that "for too long our government, our courts haven't looked like America," and his appointments reflected a commitment to changing that. Of his first 75 appointees, 49 were nonwhite (65 percent), and 57 were female (76 percent). The career path of the Biden judges also differed—he appointed a record number of former public defenders to the federal bench.[37]

The partisan and ideological disputes over the judicial nominations of recent presidents reflect the polarization in American politics more generally. Also contributing to the conflict have been the tendency of recent presidents to appoint to the federal bench judges who shared their political perspective, the increasing involvement of ideological interest groups, and the willingness of senators to use confirmation politics to court such groups. Thus, it seems likely that the appointment of federal judges will remain a lightning rod for conflict and controversy.

THE SELECTION OF SUPREME COURT JUSTICES

When Justice William Brennan retired in 1990, he had served more than a third of a century on the Supreme Court. Appointed by President Dwight Eisenhower in 1956, only two years after the Court's historic ruling in *Brown v. Board of Education*, Brennan remained on the bench through the turmoil of the 1960s, the Watergate scandal of the 1970s, and the Reagan Revolution of the 1980s. Altogether he participated in almost 5000 cases, and his opinions defined the Court's position on freedom of religion, flag burning, libel, political patronage systems, and the exclusion of illegally seized evidence.[38] During his last two decades, he led the Court's liberal wing, sometimes in the majority but in later years in dissent. Justice Harry Blackmun summed up his colleague's career upon Brennan's retirement: "By any measure, Justice Brennan must be regarded as one of the great names among those who have served on the Supreme Court of the United States." President Eisenhower's assessment was less laudatory. Asked whether he had made any mistakes during his presidency, Eisenhower reputedly replied, "Yes, two, and they [Brennan and Chief Justice Warren] are both sitting on the Supreme Court."[39]

Criteria for Selection

Justice Brennan's career, spanning eight presidential terms, shows how Supreme Court appointments can influence the course of the nation, for better or worse, long after a president's term has ended (see Table 3.2). Not surprisingly, then, presidents are actively involved in selecting Supreme Court justices. Those chosen characteristically have had distinguished

TABLE 3.2 Justices of the U.S. Supreme Court, 2023

	Date of Birth	Home State	Position Prior to Appointment	Party	Year Appointed	Appointing President
John Roberts	1955	Indiana	U.S. Court of Appeals	Republican	2005	G. W. Bush
Clarence Thomas	1948	Georgia	U.S. Court of Appeals	Republican	1991	G. H. W. Bush
Samuel Alito	1950	New Jersey	U.S. Court of Appeals	Republican	2006	G. W. Bush
Sonia Sotomayor	1954	New York	U.S. Court of Appeals	Democrat	2009	Obama
Elena Kagan	1960	Massachusetts	Solicitor General	Democrat	2010	Obama
Neil Gorsuch	1967	Colorado	U.S. Court of Appeals	Republican	2017	Trump
Brett Kavanaugh	1965	Maryland	U.S. Court of Appeals	Republican	2018	Trump
Amy Coney Barrett	1972	Indiana	U.S. Court of Appeals	Republican	2020	Trump
Ketanji Brown Jackson	1970	Washington, D.C.	U.S. Court of Appeals	Democrat	2022	Biden

public careers—they include a dozen members of Congress, many cabinet officers, and even a former president—and possess outstanding legal credentials. More than half served as judges at some time before their selection, though this is not a requirement; several outstanding justices had no prior judicial experience. Beyond these minimal qualifications, presidents have weighed several factors in making their appointments, with the importance of various factors changing over time and from president to president.

Party Affiliation Presidents have drawn more than 90 percent of all nominees from the ranks of their own party. Presidents who do cross party lines usually anticipate a political advantage from doing so. Thus, when Republican President Eisenhower appointed Justice Brennan, a New Jersey Democrat and a Catholic, he viewed the appointment as a way to appeal to potential crossover voters during an election year. Presidents typically choose only members of the opposition party with whom they feel ideologically compatible. This is exemplified in President Richard Nixon's selection in 1972 of Justice Lewis Powell, a conservative Democrat from Virginia, for the Supreme Court. Since 1972 no president has appointed a member of the opposition party.

Region Well into the twentieth century, region was important in appointments to the Supreme Court. Initially, having representation from the various sections of the country bolstered the legitimacy of the national government. From the founding through 1971, except during Reconstruction, there was a Southern seat on the Court and, until the 1930s, a New England seat as well. That concern for regional balance has now disappeared. For example, President Reagan appointed Arizona Judge Sandra Day O'Connor to the Court, even though Justice William Rehnquist was also an Arizonan.

Demographic Characteristics If region has declined in importance, demographic characteristics have increased. During the early twentieth century, a concern with religious representation led to identifiable Catholic and Jewish seats on the Court. By the late twentieth century, however, race, gender, and ethnicity were the major concerns. In 1967, President Lyndon Johnson appointed Justice Thurgood Marshall, the first African American to serve on the Court. When Marshall retired in 1991, President George H. W. Bush took into consideration the concern for black representation on the Court when he named Justice Clarence Thomas as Marshall's successor. In 1980, while campaigning for the presidency, Ronald Reagan pledged to appoint a woman to the Court, and he fulfilled that promise a year later by naming Justice Sandra Day O'Connor. Bill Clinton also chose a woman, Justice Ruth

Box 3.4 The Making of a Justice: Sonia Sotomayor

Raised in public housing in the Bronx, New York, afflicted with diabetes from an early age, and suffering the death of her father when she was only nine—this was hardly the typical childhood of a Supreme Court Justice. Yet when President Barack Obama appointed her to the Court in 2009, it completed what Sonia Sotomayor in her autobiography referred to as a rise from "my beloved world" to the highest court in the land. Sotomayor was the first person in her family to attend college. After being admitted to Princeton University as what she termed "the perfect affirmative action baby," she made the most of the opportunity, graduating *summa cum laude* and *Phi Beta Kappa* from Princeton and earning admission to Yale Law School. Following law school, Sotomayor took a position as an assistant DA in the New York District Attorney's Office, gaining valuable courtroom experience. She also joined the board of the Puerto Rican Legal Defense and Education Fund. After four-and-a-half years in the District Attorney's Office, she took a position with a New York law firm, Pavia & Harcourt, where over time she made partner and came to specialize in intellectual property law issues, such as copyright and trademark infringement. In 1991 Democratic Senator Daniel Moynihan of New York recommended Sotomayor to Republican President George H. W. Bush, who appointed her to a District Court judgeship. Six years later Democratic President William Clinton appointed her to the Court of Appeals for the Second Circuit. And in 2009, after considerable debate divided along party lines, the Senate confirmed her by a 68–31 vote, making her the fourth woman and the first Latina to sit on the Court.

SOURCES: Sonia Sotomayor, *My Beloved World* (New York: Alfred A. Knopf, 2013), and Joan Biskupic, *Breaking In: The Rise of Sonia Sotomayor and the Politics of Justice* (New York: Farrar, Straus and Giroux, 2014).

Bader Ginsburg, as his first appointee to the Court, and both President Obama's appointees, Sonia Sotomayor and Elena Kagan, were women. Justice Antonin Scalia, appointed by President Reagan in 1986, was the first Italian American on the Court, Sonia Sotomayor the first Latina, and Ketanji Brown Jackson the first black woman.

Legal–Political Compatibility Above all else, presidents want justices who share their views on constitutional issues. As President Theodore Roosevelt put it, "I should hold myself guilty of an irreparable harm to the nation if I should put [on the Court] any man who was not absolutely sane and sound on the national policies for which we stand in public life." Usually, presidents are concerned less with a potential justice's overall jurisprudential approach than with his or her position on certain salient legal issues. Thus, President Franklin Roosevelt appointed judges who shared his broad view of the national government's power to regulate the economy and who would uphold the New Deal programs he had championed. President Richard Nixon, concerned about the Court's expansion of the rights of defendants, sought to select "strict constructionist" justices who would "strengthen the peace forces as against the criminal forces of the land."[40] President George W. Bush sought judges who were opposed to abortion, sympathetic to claims of presidential power, and committed to safeguarding the role of religion in American society. But his successor, President Barack Obama, sought justices who recognized a constitutional right to abortion. The election of President Donald Trump shifted the focus once again to judges who were unsympathetic to the Supreme Court's ruling in *Roe v. Wade*.

Box 3.5 The Making of a Justice: John Roberts

John Roberts seemed destined for greatness from an early age. Growing up in Long Beach, Indiana, he was valedictorian of his high school class and captain of the football team. He continued his distinguished academic career at Harvard University, where he graduated *summa cum laude* in just three years, and at Harvard Law School, where he graduated *magna cum laude*. Following law school, he clerked first for Justice Henry Friendly of the Court of Appeals and then for Justice William Rehnquist on the U.S. Supreme Court. After clerking, he went to work in the administration of President Ronald Reagan, first as an assistant to Attorney General William French Smith and then in the White House Counsel's Office. After a brief period in private practice at Hogan & Hartson, a large Washington, D.C. law firm, he returned to government service in 1989 in the Solicitor General's Office (the office that represents the federal government in litigation). In this capacity, he argued several cases before the Supreme Court. President George H. W. Bush nominated him for a seat on the Court of Appeals in 1992 when he was only 37 years old, but the nomination was blocked by Democrats in the Senate. Roberts then returned to Hogan & Hartson, where he headed the firm's appellate advocacy division, arguing 39 cases before the Supreme Court. He gained a reputation as his generation's leading advocate before the Court. He also remained politically active, serving as an adviser to then-Governor Jeb Bush in Florida during the controversy over the outcome of the 2000 presidential election. In 2003 President George W. Bush appointed him to the Court of Appeals of the District of Columbia and, two years later, nominated him to replace retiring Justice Sandra Day O'Connor on the Supreme Court. When Chief Justice William Rehnquist died, the president switched Roberts's nomination so that he would replace the Chief Justice. After confirmation by the Senate, John Roberts became the seventeenth chief justice of the Supreme Court.

SOURCES: John Paul Stevens, *Five Chiefs: A Supreme Court Memoir* (New York: Little Brown, 2011); Jeffrey Toobin, *The Oath: The Obama White House and the Supreme Court* (New York: Doubleday, 2012); and www.supremecourt.gov/about/biographies.aspx.

Obstacles to Presidential Influence

Presidents do not always succeed in influencing the Court's orientation by their appointments. As President Harry Truman ruefully observed, "packing the Supreme Court simply can't be done. I've tried and it won't work."[41] Once appointed, the justice may not behave on the Court as the president expected. For example, after Theodore Roosevelt appointed Oliver Wendell Holmes to the Court, Holmes wrote opinions in several antitrust cases that so enraged Roosevelt that he complained: "I could carve out of a banana a Judge with more backbone than that!"[42] President Richard Nixon must have felt betrayed when Chief Justice Warren Burger ruled against his claim of executive privilege in *United States v. Nixon*, and the first President Bush was disappointed when Justice David Souter aligned himself with the liberal wing of the Supreme Court.[43]

In addition, presidents may not anticipate changes over time in the issues confronting the Court and so may not probe a nominee's views on issues that will become important. Thus, although President Nixon appointed Justice Harry Blackmun expecting that he would take a conservative position on the rights of defendants, Blackmun was best known for his opinion in *Roe v. Wade* (1973), announcing that the Constitution safeguarded a woman's right to choose to have an abortion. Indeed, in the years after that decision, Blackmun frequently aligned himself with the liberal wing of the Court. In sum, once appointed, a justice's perspective may change. Judicial independence allows justices to shed their partisanship and change their views. When this happens, there is nothing the appointing president can do. As legal scholar Alexander Bickel put it: "You shoot an arrow into a far-distant future when you appoint a Justice, and not the man himself can tell you what he will think about some of the problems he will face."[44]

Yet, one should not overstate the matter. When justices are appointed, they already have established legal views, and only rarely do those views shift dramatically once they are on the Court. Presidents seek to minimize "mistakes" by canvassing the views of potential nominees before appointment, and the recent tendency to select justices from the ranks of the federal courts of appeals facilitates such scrutiny. Thus, the appointees of Republican presidents George W. Bush (John Roberts and Samuel Alito) and Donald Trump (Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett) have established reliably conservative voting records, whereas the appointees of Democratic presidents Barack Obama (Sonia Sotomayor and Elena Kagan) and Joseph Biden (Ketanji Brown Jackson) have joined the liberal wing of the Court.

The Senate can also frustrate presidents' efforts to "pack" the Court by refusing to confirm their nominees, although it has not often done so. Only 12 Supreme Court nominees have been rejected, while 18 other nominations were either withdrawn from consideration or indefinitely postponed because of opposition in the Senate. From 1968 to 2023, however, eight of 25 nominees were rejected, withdrew, or denied a vote in the Senate. The most recent was Merrick Garland, whose story began this chapter. Moreover, even when the nominees are ultimately confirmed, the questioning during Senate committee hearings is often intense, and the vote in the Senate in recent years has tended to divide along party lines.

In part, the rejection of nominees during the late twentieth and early twenty-first centuries can be attributed to problems with particular nominees, ranging from ethical lapses to lack of judicial stature to allegations of extreme constitutional views. But in part the Senate's willingness to confirm presidential choices has also depended on political considerations. The Senate is more likely to reject a nominee if the Senate and the presidency are controlled by different parties, or if the president is politically weakened by scandal, unpopular policies, or a forthcoming presidential election. The Senate also may reject nominees opposed by powerful interest groups, and the influence of such groups has increased as the process of confirmation has become more public.

Before 1913, senators were elected by state legislatures, thus limiting their accountability to the general public. And until the 1920s Senate deliberations on prospective justices nominees were secret. Nominees did not testify, and they were confirmed or rejected without a roll-call vote, so it was impossible to know how individual senators had voted. Now, however, nominees testify before the Senate Judiciary Committee in public hearings, as do groups and individuals supporting or opposing the nominee. Since 1982, when President Reagan appointed Sandra Day O'Connor to the Court, the hearings and final confirmation votes have been televised. This opening-up of the process has made it easier for groups to mobilize opinion for or against nominees, and to influence votes on confirmation by pledging to hold senators electorally accountable. Yet, whether groups do mobilize depends on the character and views of the nominee. President Clinton's appointees to the Supreme Court, Ruth Bader Ginsburg and Stephen Breyer, were uncontroversial and overwhelmingly confirmed by the Senate. So was John Roberts, appointed as chief justice by President Bush in 2005. However, other nominees may prompt divisions along partisan lines. For example, Justice Kagan received only five Republican votes when she was confirmed by the Senate, and Justice Barrett received no Democratic votes.

WHAT DO JUDGES DO?

From Advocate to Arbiter

On assuming office, new judges immediately confront daunting responsibilities. In civil-law countries, such as France, a judge attends a specialized school and follows a separate career path from lawyers (see Box 3.6). In contrast, in the United States, prospective judges receive no special preparation. They attend law school like other lawyers and then typically pursue a career in either government or private practice. Once selected for the bench, however, they are expected to shed their identities as advocates and partisans and become impartial arbiters. Not surprisingly, many new judges find the transition difficult.[45]

First, new judges are frequently unfamiliar with much of the law they must apply. This may seem strange, because judges are chosen from the ranks of attorneys. However, the lawyers elevated to the bench have often had specialized legal practices. They may have focused on criminal law or, more likely, on civil law; they were plaintiffs' lawyers, defense attorneys, or prosecutors; they were patent attorneys, environmental lawyers, or tax specialists. Judges, in contrast, are generalists; they have jurisdiction over a wide range of conflicts, and most judges must accept whatever cases come before them. Trial judges may preside over a murder case one day and a product liability suit the next. To undertake these responsibilities, judges must become knowledgeable in areas of law they may not have studied since law school.

Second, new judges must change their basic orientation. Lawyers are accustomed to acting as advocates, taking a position and arguing it. In contrast, "the essence of the judicial role, active or passive, is impartiality and detachment, both felt and exhibited." Thus, as Justice Charles Russell of the Virginia Supreme Court has observed, "your skills [as an advocate] are so diametrically opposed to those demanded of a judge that you've got to do a frightful gear shift."[46]

Third, before their selection, judges tend to be actively involved in politics; indeed, political involvement is often a prerequisite for selection. Except in systems with partisan elections, however, judges are expected to avoid partisanship not only in their decisions but also in their behavior off the bench. Many states forbid judges from engaging in any sort of political activity, from endorsing candidates or speaking at political meetings to making political contributions. Some judges take this insulation from politics very seriously: Justice John Marshall Harlan even refused to vote during his service on the Supreme Court. Others seek to reconcile, often unsuccessfully, their political concerns and their judicial role. Justice Abraham Fortas, for example, was sharply criticized for continuing to act as an adviser to President Lyndon Johnson even after his appointment to the Supreme Court.[47] For many judges, the transition from politically engaged lawyer to what Justice Felix Frankfurter referred to as "judicial monk" is a difficult one.

A more general isolation also accompanies elevation to the bench. Becoming a judge affects one's social life: attorneys with whom one associated before selection may be reluctant to socialize for fear of being

Box 3.6 French Judges

In France, as in other civil-law systems, judges are not selected from the ranks of practicing attorneys. Prospective judges receive an education designed to prepare them for their professional responsibilities and, upon graduation, immediately commence their judicial careers.

To become a judge, one must first graduate from a university law school. Law graduates opting for a judicial career must take the examination for admission to the Ecole Nationale de la Magistrature, or National Judicial College, before their 28th birthday. The exam is highly competitive: in 1988, more than 1300 applicants took the exam, but only 186—77 men and 109 women—were admitted. Those admitted receive professional training in law and the responsibilities of a judge and also serve a probationary period before graduating.

Upon graduation, the new judges are initially assigned to one of the criminal or civil courts at the lower end of the judicial hierarchy. Because most French courts, including trial courts, sit as multijudge courts, the new graduate has the advantage of working with more experienced colleagues. From their initial assignments, judges may, over time, be promoted to higher and more important posts within the French judicial system. Advancement in the system depends on seniority and the "notations" a judge receives from senior judges and supervisors. The French judiciary is a career service—that is, judges cannot be removed from office except for gross abuse of their authority.

The closest American analogy to the French system of selection, training, and promotion is the civil service system. Like the American civil service, the French system is designed to create a set of professionals pursuing careers in a specialized field and to eliminate political considerations and personal favoritism in the selection phase through competitive examinations. The promotion process, however, may pose a threat to judicial independence, because those determining promotions may reward loyalty and conformism and penalize independence. One factor that reduces pressure toward conformity is the collegial character of most French courts. Because of the practice of announcing decisions without indicating who authored an opinion or whether there were any dissents, all judicial decisions are rendered in the name of the court as a whole, and no individual judge must take responsibility for a decision.

SOURCES: John H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford, CA: Stanford University Press, 2007); and Jacqueline Lucienne Lafon, "The Judicial Career in France: Theory and Practice under the French Republic," *Judicature* 75 (August–September 1991): 97–106.

seen as currying favor. Beyond that, trial judges find themselves moving from the collegial context of a law firm to presiding alone over a court, forced to make momentous decisions without the chance to confer with others. New judges feel this pressure particularly in sentencing. "This is the hardest part," one judge admitted. "You see so many pathetic people, and you're never sure what is a right or fair sentence."[48]

How do judges cope with these problems? Many avail themselves of formal judicial training from the Federal Judicial Center or the National Judicial College. New judges may also try to emulate successful colleagues: "Judges learn through role models."[49] Finally, they may seek the counsel of veteran judges to ease the transition from advocate to arbiter.

The Work of the Trial Judge

Most people probably think that trial court judges preside over trials. Certainly trials are the most time-consuming of their duties. But a survey of more than 3000 judges in courts of general jurisdiction found that fewer than half the judges reported presiding at trial on their most common workday.[50] Rather, most reported being involved in nontrial courtroom work. This may involve ruling on pretrial motions, such as whether evidence was illegally seized and should be excluded from trial. Judges may also preside over the resolution of cases without trial, through guilty pleas in criminal cases or default judgments in civil cases. Finally, judges may sentence defendants convicted in criminal cases.

Much of a trial judge's work, however, takes place outside the courtroom. As Chapters 5 and 6 will show, most cases are resolved through negotiated settlement, and judges promote settlement either by urging negotiations between the parties in a case or by actively participating in them. Although some judges believe it inappropriate to get involved in plea negotiations in criminal cases, many others discuss with prosecutors and defense counsel the evidence in a case, the charges to which a defendant will plead guilty, and the sentence he or she will receive. Judges also meet with opposing counsel in civil cases to encourage a settlement before trial. Effective participation in case negotiations requires not only legal expertise but also interpersonal skills, underscoring the range of talents a successful judge needs.

Judges foster settlements in civil cases and negotiated pleas in criminal cases because settlements expedite the flow of cases. It is less time consuming to settle a case than to try it. Many of a judge's administrative responsibilities are also associated with managing the flow of cases. Judges must schedule the cases on their dockets, keep up to date with the cases assigned to them, and keep track of case files and materials. In addition, a judge may be responsible for hiring law clerks and other court personnel. In trial courts with several judges, usually a senior judge is designated chief judge and assumes full-time administrative responsibilities for the court.

Finally, trial judges must keep abreast of the legal work associated with their position. Unlike appellate judges, trial judges do not issue written opinions in most cases they decide, so their writing responsibilities

Box 3.7 Chief Justice Roberts on the Job of the District Court Judge

The judge is responsible for supervising the important pretrial process and conducting the trial itself. He resolves discovery disputes, manages the selection of the jury, rules on the admission of evidence, determines the proper and understandable instruction of the jury, and resolves any issues surrounding the acceptance of the verdict and entry of judgment.

For every trial, there are scores of cases waiting in the wings—the typical federal judge has more than 500 cases on the docket. The judge must be an active and astute problem solver. Litigation is costly, and everyone benefits if disputes can be resolved efficiently with minimal expense and delay.

District judges are the first to encounter novel issues, and they must resolve them without the aid of guiding precedent. Because they work alone, district judges do not have the benefit of collegial decision-making or the comfort of shared consensus. And because of the press of their dockets, they face far more severe time and resource constraints than their appellate brethren.

SOURCE: 2016 Year-End Report on the Federal Judiciary, at www.uscourts.gov/news/2016/12/31/chief-justice-roberts-issues-2016-year-end-report.

are not onerous. However, whether judges are to be involved in negotiations or in trying a case, they must read the files in all the cases assigned to them. In addition, they must inform themselves about pertinent legal developments, such as appellate court decisions that affect their work. Taken altogether, the responsibilities of the trial judge are daunting indeed.

The Work of the Appellate Judge

Appellate courts are multijudge courts whose job is to review the legal correctness of lower court rulings in cases that are appealed to them. An appellate court announces its rulings in written opinions that explain the legal bases of its decisions. Because the responsibilities of trial and appellate courts differ, so too do the jobs of trial and appellate judges. Frank Coffin, formerly chief judge of the U.S. Court of Appeals for the First Circuit, identified his cycle of work as an appellate judge, and his experience is likely typical.[51]

According to Coffin, his first task in addressing a case was to scan the briefs submitted by the parties and, if there were any, by *amici curiae*. He also discussed the case with his clerks, who read the briefs and the record from the court below. He next listened to oral argument and discussed the case with the other judges on the court. If assigned to write the opinion in the case, he either researched and wrote a draft opinion or assigned a clerk to do so along the lines he directed. He circulated the draft opinion to his colleagues, responded to or incorporated their suggestions, and then had a final decision and opinion that would be communicated to the public.

Several differences between the work of an appellate judge and that of a trial judge are immediately apparent. First, appellate judges conduct their work in relative isolation from the outside world. Trial judges continually come into contact with members of the general public, who serve as parties, witnesses, or jurors. They also regularly interact with attorneys within the courtroom and in conferences and negotiations outside it. They get to know the "regulars" in their court quite well and tend to socialize with them during the course of the workday. In contrast, appellate judges have no direct contact with the parties or witnesses in the cases they hear, and their communications with lawyers are formal, occurring solely through the submission of legal briefs and through oral argument in court. Because the appellate court draws cases from a much larger geographic area than the trial court, appellate judges are unlikely to develop close ties with the attorneys who argue before them.

Second, appellate judges' isolation is mitigated by their interaction with other appellate judges and court personnel. Whereas trial courts operate within severe time constraints in processing cases, the pace of work in appellate courts promotes deliberation. Often the chambers of an appellate judge work like an autonomous "law firm," conducting legal research, discussing cases, and preparing opinions. Judges also discuss cases with colleagues after they have been argued, participating in the continuing interchange necessary to produce decisions that reflect truly collaborative deliberations. Trial judges may be the rulers of their courtrooms, but appellate judges act as part of a team.

Third, in contrast with a trial court, an appellate court issues written opinions in most of the cases it decides. As a result, a large proportion of an appellate judge's time is spent reading legal briefs, doing research, and writing judicial opinions. Indeed, Justice Stephen Breyer is fond of telling law students, "If you do your homework very well, you will get a job where you can do homework the rest of your life."[52]

Part of the opinion-writing process also involves responding to the draft opinions of colleagues. Typically, the response to a colleague's opinion takes the form of a memorandum that accepts some aspects of the opinion and constructively critiques others. When a judge perceives problems with an argument in a colleague's opinion, collegiality demands that the judge offer an alternative line of argument or a different formulation. Such a detailed critique usually cannot be conveyed orally, and thus much of the communication among the judges on a case is in writing. In many instances this interchange enables the court to devise an opinion that all the judges can join. Failing that, the exchange of views may narrow the differences among the judges. Because so much hinges on the opinions issuing from the court, appellate judges need to be good writers.

Finally, in reviewing the rulings of trial courts, appellate judges continually confront complex and difficult legal questions. Resolving these questions tests the judges' knowledge of the law and their analytic capacity. Because they must decide whether the trial court's actions are consistent with authoritative legal precedent, judges must update themselves on recent legal developments. Because the pertinent precedents often offer guidance without altogether resolving an issue, appellate judges must analyze the issue in light of logic, precedent, policy, and a host of other factors, guided by professional norms and the traditions of the law. They then must provide a persuasive justification for the conclusions they reach. These responsibilities can challenge even the most talented and conscientious judge.

CONCLUSIONS

This chapter revealed important differences in the responsibilities of trial court judges and appellate judges. Yet, what distinguishes these judges is less important than what unites them: All play an important role in governance. Their decisions help define the law that governs state and nation. Moreover, their rulings reflect, at least to some extent, the legal perspectives of the judges who render them. Not surprisingly, then, the criteria for selecting judges and the processes by which they are selected have aroused controversy throughout U.S. history.

Some commentators argue that the independence of judges should be maximized so that judges can render decisions unaffected by partisan concerns or external pressures. Advocates of judicial independence champion modes of selection that minimize the influence of political parties, such as merit selection and nonpartisan elections, as well as extended terms of office for judges or tenure during good behavior. To some extent their efforts have succeeded, as indicated by the rapid spread of merit selection in the states since the mid-twentieth century.

However, other commentators on judicial selection maintain that judges, like other officials whose decisions have political consequences, should be accountable to—perhaps even responsive to—the populace. Proponents of this position typically favor partisan judicial elections or the appointment of judges by the executive. Despite the spread of merit selection, there seems to be a resurgence of efforts to hold judges accountable for their views and their judicial decisions. The vast sums of money spent in state judicial elections reflects this, as does the increasing scrutiny of the political and legal views of nominees to federal appellate courts.

Finally, still other commentators have insisted that the state and federal bench should reflect the demographic diversity of the nation. Presidents Clinton, Obama, and Biden named women to fill four of the five vacancies on the Supreme Court that developed during their terms of office; and even presidents opposed to affirmative action, such as Presidents Reagan and Bush, considered demographics in their appointments of Justices Sandra Day O'Connor and Clarence Thomas.

Even as one recognizes the importance of who judges, it is not judges alone who determine the political role that courts play. Judges can only address the issues that are brought before them and, thus, they depend on lawyers and their clients for their agenda. It is to these equally important actors in the judicial process that the discussion now turns.

NOTES

1 This account draws on Joan Biskupic, "How Mitch McConnell won the SCOTUS fight (for now)," *CNN*, September 29, 2016; Heidi M. Przbyla, "Democrats use Trump's populism against him in fight over Gorsuch nomination," *USA TODAY* April 5, 2017; and Carl Hulse, "How Mitch McConnell Delivered Justice Amy Coney Barrett's Rapid Confirmation," *New York Times*, October 27, 2020.

2 *Bush v. Gore*, 531 U.S. 98 (2000); *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

3 G. Alan Tarr, *Without Fear or Favor: Judicial Independence and Judicial Accountability in the States* (Stanford, CA: Stanford University Press, 2012), chaps. 1–2.

4 Melinda Gann Hall, "State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform," *American Political Science Review* 95 (June 2001): 317–319.

5 Lawrence Baum, *American Courts*, 2nd ed. (Boston: Houghton Mifflin, 1990), p. 102.

6 *Judicial Elections in the 21st Century*, Chris W. Bonneau and Melinda Gann Hall, eds. (New York: Routledge, 2017), chaps. 7–9.

7 *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); *Williams-Yulee v. Florida Bar*, 575 U.S. 433 (2015). Research has found that *White* did not affect "the propensity for challengers to take on incumbents, the willingness of citizens to vote, or the actual costs of campaigns" in state supreme court elections. Chris Bonneau and Melinda Gann Hall, *In Defense of Judicial Elections* (New York: Routledge, 2009), p. 134.

8 Philip Dubois, "Voter Turnout in State Judicial Elections: An Analysis of the Tail of the Electoral Kite," *Journal of Politics* 41 (August 1979): 865–888.

9 Expenditures in Alabama judicial races are reported in Mark Hansen, "A Run for the Bench," *American Bar Association Journal* (October 1998): 69–70. 433

10 James Alfini and Terrence Brooks, "Ethical Constraints on Judicial Election Campaigns: A Review and Critique of Canon 7," *Kentucky Law Journal* 77 (1988–1989): 671.

11 Gregory A. Huber and Sanford C. Gordon, "Accountability and Coercion: Is Justice Blind When It Runs for Office?" *American Journal of Political Science* 48 (April 2004): 247–263; and Melinda Gann Hall, "Electoral Politics and Strategic Voting in State Supreme Courts," *Journal of Politics* 54 (1992): 427–446.

12 Kathleen L. Barber, "Partisan Values in the Lower Courts: Reapportionment in Ohio and Michigan," *Case Western Reserve Law Review* 20 (February 1969): 403.

13 Larry T. Aspin, "Judicial Retention Elections," in *Judicial Elections in the 21st Century*, p. 127; see also Hall, "State Supreme Courts," p. 318, table 2, and p. 319, table 4.

14 G. Alan Tarr, "Does the New Judicial Federalism Have a Future?" *Rutgers Law Review* 74 (Summer 2022): 1425.

15 Kenyon N. Griffin and Michael J. Horan, "Patterns of Judicial Behavior in Judicial Retention Elections for Supreme Court Justices in Wyoming," *Judicature* 67 (August 1983): 72.

16 Susan B. Carbon, "Judicial Retention Elections: Are They Serving Their Intended Purpose?" *Judicature* 64 (November 1980): 226.

17 *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

18 See Barry Latzer, "California's Constitutional Counterrevolution," *Constitutional Politics in the States*, G. Alan Tarr, ed. (Westport, CT: Greenwood Press, 1996), pp. 155–158; and Stephen B. Bright and Patrick J. Keenan, "Judges and the Politics of Death: Deciding between the Bill of Rights and the Next Election in Capital Cases," *Boston University Law Review* 75 (May 1995): 759–835.

19 Larry T. Aspin and William K. Hall, "Retention Elections and Judicial Behavior," *Judicature* 77 (May–June 1994): 312, table 4.

20 Quoted in Martin A. Levin, *Urban Politics and the Criminal Courts* (Chicago, IL: University of Chicago Press, 1977), p. 13.

21 William Hall and Larry T. Aspin, "What Twenty Years of Judicial Retention Elections Have Told Us," *Judicature* 70 (April–May 1987): 332, 344–345.

22 Quoted in Richard A. Watson and Rondal G. Downing, *The Politics of the Bench and the Bar: Judicial Selection under the Missouri Non-Partisan Court Plan* (New York: John Wiley & Sons, 1969), p. 186.

23 For a review of pertinent studies, see Daniel R. Pinello, *The Impact of Judicial-Selection Method on State Supreme Court Policy: Innovation, Reaction, and Atrophy* (Westport, CT: Greenwood Press, 1995).

24 Richard Neely, *Why Courts Don't Work* (New York: McGraw-Hill, 1983), pp. 41–42.

25 Brennan Center for Justice, "State Supreme Court Diversity—May 2022 Update," at www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity.

26 Frederic Block, *Disrobed: An Inside Look at the Life and Work of a Federal Trial Judge* (Eagan, MN: West, 2012), p. 192.

27 See Sheldon Goldman, "Unpicking Pickering in 2002: Some Thoughts on the Politics of Lower Federal Court Selection and Confirmation," *U.C Davis Law Review* 36 (February 2003): 695–719; Lisa Holmes and Elisha Savchak, "Judicial Appointment Politics in the 107th Congress," *Judicature* 86 (March–April 2003): 232–239.

28 See Deborah J. Barrow, Gary Zuk, and Gerard S. Gryski, *The Federal Judiciary and Institutional Change* (Ann Arbor: University of Michigan Press, 1996).

29 Quoted in Neely, *Why Courts Don't Work*, p. 37.

30 Quoted in David M. O'Brien, *Judicial Roulette* (New York: Priority Press, 1988), p. 33.

31 These data are drawn from Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan* (New Haven, CT: Yale University Press, 1997), pp. 349–350, table 9.1.

32 Joseph Samuel Perry, "How I Got to Be a Federal Judge," in *Courts, Judges, and Politics*, 2nd ed., Walter F. Murphy and C. Herman Pritchett, eds. (New York: Random House, 1974), p. 169.

33 Quoted in J. Woodford Howard Jr., *Courts of Appeals in the Federal Judicial System* (Princeton, NJ: Princeton University Press, 1981), p. 93.

34 Quoted in ibid., p. 101.

35 Donna Owens, "Obama's Legacy on Judicial Appointments: By the Numbers," at www.nbcnews.com/storyline/president-obama-the-legacy/obama-s-legacy-judicial-appointments-numbers-n709306.

36 John Gramlich, "How Trump Compares with Other Recent Presidents in Appointing Federal Judges," at www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal judges.

37 "Federal Judicial Appointments by President," at https://ballotpedia.org/federal_judicial_appointments and John Gramlich, "Biden Has Appointed More Federal Judges Than Any President Since JFK at This Point in His Tenure," at www.pewresearch.org/fact-tank/2022/08/09/biden-has-appointed-more-federal-judges-than-any-president-since-jfk-at-this-point-in-his-tenure.

38 On freedom of religion, see *Sherbert v. Verner*, 374 U.S. 398 (1963); on flag burning, see *Texas v. Johnson*, 491 U.S. 397 (1989); on libel, see *New York Times v. Sullivan*, 376 U.S. 254 (1964); on political patronage, see *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); and on the exclusion of illegally seized evidence, see *Mapp v. Ohio*, 367 U.S. 643 (1961).

39 Harry A. Blackmun, "A Tribute to Mr. Justice Brennan," *Harvard Civil Rights Civil Liberties Law Review* 26 (Winter 1991): 1; Eisenhower quoted in Henry J. Abraham, *Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Clinton* (Westport, CT: Greenwood Press), p. 200.

40 The Roosevelt quotation is from William H. Rehnquist, *The Supreme Court*, 2nd ed. (New York: Knopf, 2001), pp. 216–217; the Nixon quotation from Donald Grier Stephenson, Jr., *Campaigns and the Court: The U.S. Supreme Court in Presidential Elections* (New York: Columbia University Press, 1999), p. 181.

41 Quoted in Abraham, *Justices, Presidents, and Senators*, p. 51.

42 Quoted in ibid., p. 51.

43 *United States v. Nixon*, 418 U.S. 683 (1974). On President Bush's expectations for Souter, see Tinsley E. Yarbrough, *The Rehnquist Court and the Constitution* (New York: Oxford University Press, 2000), pp. 19–22.

44 Quoted in Abraham, *Justices, Presidents, and Senators*, pp. 51–52.

45 The analysis in this section relies on "On Becoming a Judge: Socialization to the Judicial Role," *Judicature* 69 (October–November 1985): 139–146; and Robert Carp and Russell Wheeler, "Sink or Swim: The Socialization of a Federal District Judge," *Journal of Public Law* 21 (1972): 359–394.

46 Quotations drawn from "On Becoming a Judge," pp. 140–141.

47 See Bruce A. Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* (New York: William Morrow, 1988).

48 Quoted in Carp and Wheeler, "Socialization of a Federal District Judge," p. 373.

49 Quoted in "On Becoming a Judge," p. 141.

50 John Paul Ryan, Allan Ashman, Bruce D. Sales, and Sandra Shane-Dubow, *American Trial Judges* (New York: Free Press, 1980), pp. 150–151.

51 Frank M. Coffin, *The Ways of a Judge: Reflections from the Federal Bench* (Boston: Houghton Mifflin, 1980), p. 79.

52 Quoted at http://www.slate.com/blogs/blogs/convictions/default.aspx.

4

Lawyers

This is a tale of two lawyers who pursued very different legal careers before serving together on the U.S. Supreme Court.[1] Lewis Powell was born in 1907 to a wealthy, "old line" family in southern Virginia (the original Powell landed at Jamestown in 1607). As an undergraduate, Powell excelled at Washington and Lee College, graduating first in his class. Two years later, he received his law degree from the same school. After a year at Harvard Law School, where he received a master's degree in 1932, Powell joined one of the most prestigious law firms in Richmond, Virginia. He rose to the rank of senior partner in the firm, which had more than 100 lawyers by the time he was appointed to the Court. In his 35 years of private practice, he represented a long roster of important corporate clients, such as the Baltimore and Ohio Railroad and the Prudential Insurance Company. He also served on the board of directors for 11 major companies.

Powell's national stature led to his election as president of the American Bar Association (ABA) in 1964, and as president of the American College of Trial Lawyers in 1968. Like many lawyers, he was also active in community affairs. As president of the Richmond School Board, Powell guided the racial desegregation of the city's schools in the 1950s. He also served as president of the state board of education in the late 1960s. In 1971, President Richard Nixon appointed him to the Supreme Court, and, after the ABA and the Virginia chapter of the National Association for the Advancement of Colored People (NAACP) enthusiastically endorsed him, the Senate confirmed him by an 89–1 vote.

Thurgood Marshall, the most important American lawyer of the twentieth century, came from less prosperous circumstances. The great-grandson of a slave, Marshall was born in 1908, a year later than Powell, in Baltimore,

DOI: 10.4324/9781003440055-5

Maryland. His parents—a club steward and an elementary school teacher—stressed education. To help pay his college expenses, his mother sold her engagement ring. Marshall repaid this confidence by excelling at Lincoln University and then at Howard University Law School, where he graduated first in his class. Following graduation, Marshall enlisted in the efforts of the NAACP to combat racial discrimination. For more than 20 years, as head of the NAACP Legal Defense Fund, he instituted or managed hundreds of cases challenging discriminatory laws dealing with voting, housing, education, and public accommodations. Several times he successfully pursued these challenges to the Supreme Court. His most important victory came in *Brown v. Board of Education* in 1954, when he persuaded the Court to invalidate racial discrimination in public education.

Marshall's formidable skills as an advocate were not confined to his service with the NAACP. Four years after his elevation to the U.S. Court of Appeals by President John Kennedy, President Lyndon Johnson appointed him solicitor general, the government's chief advocate before the Supreme Court. As the nation's first African American solicitor general, he won several important civil rights victories, including a Supreme Court ruling upholding the constitutionality of the 1965 Voting Rights Act. By the time President Johnson appointed him to the Supreme Court in 1967, Marshall had argued 32 cases before that Court, winning 29 of them.

The careers of Thurgood Marshall and Lewis Powell illustrate three important points about lawyers and the legal profession:

1. *Diverse legal practices.* Before their appointment to the Supreme Court, Marshall and Powell pursued altogether different legal practices. They differed in the types of clients they served, the amount of time they spent in court, the issues they addressed, and the ends they sought to achieve. Their careers show that lawyers may employ their talents in a wide variety of contexts for quite different clients and ends. They may become litigators, like Marshall, pursuing their clients' interests in the clash of courtroom conflict. Many lawyers—including prosecutors, criminal defense attorneys, and lawyers in personal injury cases—are regularly involved in trial or appellate litigation. Alternatively, like Powell, lawyers may serve primarily as legal counselors, negotiating contracts or other legal agreements or seeking by their advice to prevent legal disputes from arising. In fact, most lawyers spend little or no time in court.

   One could easily multiply examples of the sorts of career a lawyer might pursue: high-powered lawyer and lobbyist, solo practitioner serving the legal needs of average citizens, in-house counsel to a corporation, investigator for a government agency, and so on. The diversity of career choices reveals the myriad uses to which legal skills may be put and the range of activities that demand legal expertise. It also shows that most lawyers specialize in the sort of law they practice and in the clients they represent.

2. *The ends of lawyering.* In his legal practice, Lewis Powell, like most lawyers, served as the "delegate" of his clients; that is, he sought to advance their aims and interests, as they defined them, within the confines of the law. In contrast, Thurgood Marshall served more as the "trustee" for his clients. He sought to advance the interests of his African American clients by promoting political goals that those clients—and other African Americans—could be assumed to share. Thus, Marshall's choice of cases, and the way he framed legal issues, were determined by how those choices would serve long-term political goals.[2] Each of these relationships between lawyer and client poses dilemmas. "Delegate" attorneys may face a conflict between the interests of their clients and the demands of justice or the good of society. This conflict, though not confined to criminal law, is clearest perhaps when an attorney defends a guilty client in a criminal case. "Trustee" attorneys may confront situations in which the pursuit of their political goals seems to conflict with the immediate interests of their clients. In such circumstances, they must determine how to advance the interests of a particular client without compromising their own goals.
3. *The law as a public profession.* Law is considered a "public profession" because the practice of law affects the public life of the nation. This is true not only when lawyers serve as judges, as did Marshall and Powell, but also when lawyers pursue careers in politics or in public service. But even without holding public office, lawyers affect law and public policy. They may, like Marshall, deliberately design their legal practices to advance political ends. Or they may influence public affairs less directly, as did Powell, through their involvement in national organizations such as the ABA, or through their representation of large economic enterprises. Whatever the avenue, lawyers affect the public life of the nation through their expertise and the uses to which they put it.

Americans are ambivalent about lawyers, their skills, and their power. In a 2021 Gallup Poll, only 19 percent of Americans gave lawyers high marks for honesty and ethical standards.[3] A 1997 movie, *Devil's Advocate*, even portrayed Satan as a lawyer. Public ambivalence about lawyers is captured in the quotations collected in Box 4.1.

THE TROUBLE WITH LAWYERS

From Clarence Darrow to Thurgood Marshall, lawyers have been celebrated for seeking justice for their clients and for promoting just but

Box 4.1 Perspectives on Lawyers

"Woe unto you, lawyers! for ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers."

Luke 11:46

"Underneath, most lawyers are boy scouts."

Geoffrey Hazard, Yale Law School professor

"Lawyer: One skilled in circumvention of the law."

Ambrose Bierce, American writer and humorist

"The zealous defense attorney is the last bastion of liberty, the final barrier between an overreaching government and its citizens."

Alan Dershowitz, defense attorney

"Lawyers are plants that will grow in any soil that is cultivated by the hands of others; and when once they have taken root, they will extinguish every other vegetable that grows around them … They are here what the clergy were in past centuries. A reformation equally useful is now wanted."

J. Hector St. John de Crèvecoeur, eighteenth-century writer

"The first thing we do, let's kill all the lawyers."

William Shakespeare

SOURCES: The King James Bible; Geoffrey Hazard, quoted in David Mellinkoff, *The Conscience of a Lawyer* (St. Paul, MN: West Publishing, 1973), p. 9; Ambrose Bierce, *The Devil's Dictionary* (Cleveland: World Publishing, 1911), p. 187; Alan Dershowitz, *The Best Defense* (New York: Random House, 1982), p. 415; J. Hector St. John de Crèvecoeur, *Letters from an American Farmer* (1782), quoted in Lawrence Friedman, *A History of American Law*, 2nd ed. (New York: Simon & Schuster, 1985), p. 304; and William Shakespeare, *Henry VI*, Part 2, act 4, scene 2, line 74.

unpopular causes. Yet the specialized knowledge that enables lawyers to crusade for justice may be put to other uses as well.

Lawyers may use their legal expertise to advance their own interests. Critics sometimes accuse lawyers of dishonesty or of generating business by creating disputes where none previously existed. Major breaches of professional ethics can presumably be handled through the disciplinary procedures of the bar or disbarment by a court. More serious is the complaint that lawyers are "hired guns" who have no compunction about shifting allegiances from one client to the next or about representing reprehensible people with immoral purposes. Illustrative of this concern was the public outcry about attorneys who represented suspected terrorists held at the American prison at Guantanamo in the aftermath of 9/11. A further concern is the potentially distorting effect of wealth on the legal process. Legal expertise is a form of power, and the wealthy can afford more and better legal representation than can average citizens.

Some lawyers' apparent lack of concern about justice likewise fuels public distrust. Even when they believe their clients committed horrible crimes, criminal lawyers seek their acquittal. In personal injury suits, attorneys try to help their clients reduce or escape altogether legal liability for the injuries they caused. If the actions of clients are immoral, some argue, lawyers should not promote or defend them, because doing so compounds the immorality.

It should be obvious that such criticism is somewhat inconsistent with the praise of fearless defense attorneys. Are only the innocent or the popular entitled to an effective legal defense? What underlies this criticism of the legal profession may be a concern about how effective the American adversary system is in achieving justice. For within this adversary system, lawyers who vigorously defend reprehensible clients are acting properly. As the ABA has emphasized, "The duty of a lawyer to his client and to the legal system are the same: to represent his client zealously within the bounds of the law." Or as a practicing lawyer pungently put it: "Litigation is war. The lawyer is a gladiator and the object is to wipe out the other side."[4] (For the quite different responsibilities of a lawyer in an inquisitorial system, see Box 4.2.)

Box 4.2 Lawyers and Trials Under an Inquisitorial System

To those familiar with the aggressive trial advocacy of American attorneys, a trial in an inquisitorial system, such as France's or Germany's, may seem quite odd. In an adversarial system, the opposing lawyers formulate the issues and control the development of the trial by calling their own witnesses, examining them, and vigorously cross-examining the witnesses called by the other side. The judge largely acts as umpire in the battle between the opposing sides.

In contrast, in an inquisitorial system, the role of the judge is expanded and that of the lawyers reduced. The presiding judge at trial is actively involved in the search for justice. Although the lawyers for each side may nominate witnesses, the judge determines whether they will testify and whether additional witnesses, including expert witnesses, will also be questioned. The witnesses themselves are questioned by the presiding judge, not by the attorneys, although an attorney may pose additional questions after the judge has concluded his or her questioning. (In practice, attorneys rarely ask further questions, because too many questions might imply that the presiding judge had not done a good job—hardly a wise thing to suggest.) The lawyers cannot even prepare and rehearse their witnesses before they appear, as is regularly done in the United States. Such preparation of witnesses is viewed as inconsistent with the search for justice. In Germany, for example, the rules of legal ethics expressly forbid attorneys from coaching witnesses and even discourage them from contacting witnesses before the trial.

This is not to say that lawyers play no role in an inquisitorial system. They submit written pleadings on behalf of their clients and may, in civil cases, prepare amended pleadings as the case progresses. They also make closing arguments at trial, although the effectiveness of rhetorical flourishes is presumably limited, because the arguments are addressed to a panel of judges rather than a jury. Such flourishes are unlikely anyway, because they are inconsistent with the responsibility of the lawyer under an inquisitorial system. In an adversarial system, the duty of attorneys during litigation is, according to the ABA, to "represent their clients zealously within the confines of the law." In an inquisitorial system, in contrast, the lawyer is—according to the German code of legal ethics—an "independent organ in the administration of justice." Thus, the American attorney's concern is for his or her client; the German attorney's is for justice.

American lawyers recognize that a wholehearted commitment to their clients is necessary to prevail at trial and that success at trial leads to greater status and, presumably, higher fees. Inquisitorial systems, however, have largely eliminated financial inducements to vigorous advocacy. In Germany, for example, legal fees for various types of cases are established by law. Whether one wins or loses, one receives the same fee, no matter how many hours have been devoted to case preparation. Thus, inquisitorial systems not only discourage excessive zeal in advocacy but also remove the material incentives to engage in it.

Is an inquisitorial, judge-centered system or an adversarial, lawyer-centered one better at achieving justice? On this question there is no consensus. The inquisitorial system places considerable faith in the wisdom and fairness of the presiding judge. Americans are less willing to rely on the good faith and good judgment of a single individual, so it may be that different legal systems work well for different societies.

SOURCES: John Langbein, "The German Advantage in Civil Procedure," *University of Chicago Law Review* 52 (1985): 823–866; David Luban, *Lawyers and Justice* (Princeton, NJ: Princeton University Press, 1988); and John Merryman, *The Civil Law Tradition*, 3rd ed. (Stanford, CA: Stanford University Press, 2007).

Obviously, partisan advocacy by attorneys in an adversarial system does not by itself guarantee just outcomes. However, an attorney presenting a client's case is only one element in the process. Another lawyer will present evidence and arguments for the opposing side in the case, a judge will serve as umpire of the dispute, and a judge or jury will reach a decision by weighing the arguments and evidence presented. The assumption is that a partisan presentation by each side will ensure that all pertinent facts and legal arguments are brought forward and evaluated, thereby promoting a well-informed decision. Most American lawyers strongly believe in the adversary system.

Does the adversary system ensure justice in all cases? Obviously not; there are undoubtedly instances in which the guilty go free or the innocent are convicted, although in at least some instances, this may result from the failure of attorneys to meet their responsibility of vigorous advocacy rather than from the adversary system itself. The real question is whether the adversary system works better than other legal systems. The answer to this question is unclear. Neither those nations that employ the adversarial system nor those that use the inquisitorial system seem inclined to change, as they presumably would if the alternative system were demonstrably superior. Unless the United States abandons the adversary system—and there is no real prospect that it will—lawyers will continue, quite properly, to act as advocates both for morally upright and morally dubious clients and enterprises.

THE LEGAL PROFESSION

Becoming a Lawyer

Today in the United States, the process for becoming a lawyer is straightforward. First, a student must earn an undergraduate degree. During their junior or senior years, prospective law students take the Law School Admission Test (LSAT), which is designed to measure their ability to succeed in law school. (To simplify matters, I ignore here the increasing number of applicants who enter the workforce for a period before applying to law school and the increasing number of law schools that have recently dispensed with the LSAT.) Most law schools use the score on this test—along with undergraduate grades, recommendations, and other factors—in deciding whom to admit. Law school itself involves three years of intensive legal studies (four or five years for students enrolled in a part-time evening program). Those who graduate typically must pass the bar examination for the state in which they wish to practice law, although a few states exempt from the exam those who attend a law school within the state.

The bar exam tests the prospective lawyer's knowledge of the law of the state. Most jurisdictions also include a multistate component, which poses more general legal questions. Because so much rides on passing the bar exam, recent graduates of law school typically enroll in bar-preparation "cram" courses before taking the exam. Nationally, approximately 70 percent of those who take the bar exam pass it, although success rates vary dramatically from state to state. (Some states, such as California and Florida, have sought to limit the number of attorneys practicing within their borders by creating very difficult bar exams.) Those who fail the bar exam are permitted to retake it, and roughly 90 percent of those who fail initially eventually pass. Those who pass the exam and survive the state bar's character check are admitted to legal practice.

Legal Education Abroad In other countries, the path to becoming a lawyer is quite different. In France, for example, students study law as their undergraduate curriculum and then proceed to a one-year training program—half course work and half training in a law firm—that is capped by a qualifying exam. After passing the exam, they are entered on the list of trainee lawyers and receive two more years of training in a law office before admission to the rank of *avocat*. Great Britain has a bifurcated legal profession (see Box 4.3), with the principal courtroom

Box 4.3 The Legal Profession in Great Britain

Venture into a British courtroom, and you will find the prosecutor and defense attorney dressed in flowing robes and wearing powdered wigs. But their attire is not all that distinguishes British attorneys from their American counterparts. Upon admission to the bar, American lawyers can undertake all the functions associated with legal practice. This is not the case in Great Britain. Since the fourteenth century, the British have had a bifurcated legal profession, with those practicing law divided into barristers and solicitors. The members of these groups receive different legal training and perform distinct functions in the British legal system.

Most legal business is taken care of by solicitors. In 2020 more than 148,000 solicitors were serving a population of more than 65 million. The solicitor has traditionally been a law office practitioner, advising clients on legal, business, and personal matters. Thus, solicitors' responsibilities run the gamut from matrimonial matters and divorce, drawing up wills, and drafting business contracts to attempting to secure redress from debtors. Until the 1980s, solicitors also held a legal monopoly on conveying property, or transferring land from one person to another, which for most solicitors was a major source of income. In addition, solicitors appear as advocates in minor legal disputes that are resolved in limited jurisdiction courts, such as magistrates' courts or county courts. The number of solicitors has increased more than 36 percent in the last decade.

At times, however, a client beset by more serious legal problems may require the services of a barrister as well. Note the "as well," for in most cases a client is obliged first to seek legal advice from a solicitor. If the solicitor believes that the problem will involve litigation in a general jurisdiction court or appellate court, it is the solicitor who selects a barrister and briefs him or her on the case. The barrister then argues the case in court.

As this description suggests, barristers are an elite group specializing in trial and appellate advocacy. The elite character of the group is reinforced by its size: about 17,000 barristers practice in the United Kingdom. Within the ranks of barristers, there is a further division between King's Counsel and junior counsel. The former, also known as silks because of the material of their robes, comprise less than 9 percent of all barristers. They are chosen by the Lord Chancellor, the nation's highest legal official, for their legal ability and reputation. Members of King's Counsel not only argue the most important cases, sometimes assisted by junior counsel, but they also form the pool from which British judges are selected.

Under the British system, a litigant in an important case may have three lawyers: the solicitor, the King's Counsel arguing the case, and the junior counsel assisting in the argument. Aside from tradition, why have such a cumbersome and expensive division of the legal profession? Advocates of the current system argue that fusion of the legal profession would not reduce costs because, in a difficult case, a lawyer might still wish to bring in a specialized advocate with expert knowledge in the field. In addition, the selection of the barrister by the solicitor, rather than the client, serves to create a distance between barrister and client that enables the barrister to provide more dispassionate advice. Finally, under the "cab rank" principle, which requires barristers to take any brief sent to them, the system ensures that even the most brutal or politically unpopular defendant will obtain legal representation.

SOURCES: Mary Ann Glendon, Michael W. Gordon, and Christopher Osakwe, *Comparative Legal Traditions*, 2nd ed. (St. Paul, MN: West Publishing, 2002); statistics are drawn from: www.statista.com/statistics/319/220/number-of-solicitors-in-the-UK/.

attorneys, called barristers, historically receiving their training at the Inns of Court rather than at university law schools, although this has changed somewhat in recent years.[5]

The Transformation of Legal Education in the United States Until the twentieth century, most American lawyers never attended law school. In 1860, there were only 22 law schools nationwide, and they enrolled relatively few students. During its first 12 years of operation (1817–1829), Harvard Law School averaged only nine students a year.[6] Instead, before 1900, most lawyers received their legal education by clerking in the office of a practicing attorney. They would read law books and assist the lawyer, often by taking on the drudge work of the practice. The quality of the preparation this apprenticeship provided varied, but even poor preparation rarely prevented one from practicing law. Admission to the bar tended to be lax. In 1879, only 15 of 38 states required formal training; bar examinations, typically conducted orally by local judges, were perfunctory at best. Gustave Koerner, who began his practice in Illinois during the 1830s, described his exam as lasting only half an hour, in which a few desultory questions were asked; then everyone adjourned for rum toddies.[7]

The last decades of the nineteenth century witnessed the emergence of the modern law school and, with it, a movement toward formalized legal education. The central figure in these changes was Christopher Columbus Langdell, the dean of Harvard Law School from 1870 to 1895. Langdell conceived of law as a science consisting of a limited number of principles or doctrines that could be applied to "the ever-tangled skein of human affairs." The way to discover these principles, he believed, was by studying appellate court opinions.[8]

Several innovations in legal education followed from these assumptions: If law is a science, then legal study belongs in an academic setting rather than in a law office; and law school, not apprenticeship, is the way to train lawyers. The teachers at such schools should be selected on the basis of their knowledge of those principles rather than their experience in the law. So Langdell hired full-time law professors rather than relying on practicing lawyers who taught part-time. These instructors should introduce students to the important appellate decisions elaborating those principles. To facilitate this, under Langdell's leadership pertinent cases were for the first time collected in casebooks. Finally, instead of lecturing, instructors should develop students' skill in analyzing cases and identifying legal principles. Thus, the standard mode of instruction became Socratic questioning, with the instructor calling on students to answer probing questions about cases they had read. The contemporary flavor of these innovations testifies to Langdell's success. Although his innovations were controversial initially, all law schools today employ faculties of full-time academics who use the case method and Socratic questioning.

The spread of Langdell's innovations coincided with enormous growth in the number of law schools and law students. Between 1889 and 1909, the number of law schools doubled, and the number of law students quadrupled.[9] This expansion occurred primarily in urban areas, where part-time schools—often with lax admissions standards—flourished by providing opportunities for recent immigrants and other working people to pursue a professional career. During the first third of the twentieth century, however, bar associations and the Association of American Law Schools campaigned to raise admissions standards for law school in order to upgrade the quality of the legal profession and reduce competition within it. States began to require that candidates for the bar be graduates of an accredited law school. During the Great Depression, many part-time law schools, already struggling to survive, were forced to close because they could not meet ABA accreditation standards. Among the casualties were three of the nation's four black law schools. Portia Law School, founded in 1908 to serve an all-female student body, abandoned its special mission and became the New England School of Law.[10]

Since World War II, legal education has expanded considerably. From 1947 to 2023, the number of ABA-approved law schools jumped from 109 to 196, and many schools also increased the size of their student bodies. But this proliferation of law schools did not make access to the legal profession easier. Because the demand for legal education outpaced the supply, law schools became increasingly selective. As late as 1960, Harvard Law School admitted half of all applicants.[11] Today, elite law schools are incredibly selective: Yale Law School admits about 200 students a year, only 7 percent of those who apply.[12] Even at less prestigious institutions, the ratio of applications to admissions increased dramatically, until schools felt the effects of the Great Recession and of reduced job prospects for law school graduates. The effects of this were dramatic: in 2010 there were 147,525 students enrolled in law school, but by 2017 the number had shrunk to 110,127 before rebounding to 117,305 in 2021.[13]

Box 4.4 Does it Make Sense to Go to Law School?

In recent years more students have graduated from American law school than there were legal jobs available. Starting in 2004, employment in law firms started to decline, although law school graduates found opportunities in corporate law offices and in the public sector. But with the onset of the Great Recession (2007–2009), job prospects declined across the board, as the legal sector lost more than 45,000 jobs. Almost a year after graduation, only 64.5 percent of the law school Class of 2016—which numbered more than 35,000—had jobs that required passing the bar exam, and almost 9 percent were still unemployed. Salaries too were affected; the median starting salary for law school graduates declined, as fewer jobs were available at larger firms and in private practice more generally. With the nation's economic recovery, job prospects in law have rebounded somewhat: 76 percent of the law school Class of 2021 were in jobs that required passing the bar exam, and only about 5 percent were unemployed.

The cost of law school has risen in recent years, with the average tuition in 2019 for state residents attending public law schools at more than $28,100 per year. Tuition at private law schools in 2019 topped $41,600 per year, up from $9800 just 25 years before, and tuition and fees at some leading law schools now total more than $65,000 per year. Many students therefore must borrow heavily to finance their legal studies. According to the National Center for Education Statistics, 69 percent of law school graduates had student loans, and the average loan balance was $145,500. Repaying this level of debt, even assuming one obtains a job in the law, can be a daunting prospect. For example, according to the Department of Education's repayment calculator, for a total debt of $145,000, the monthly payment is $1609 for 10 years.

These figures do not mean that one should forego a career in law. There certainly continue to be fulfilling and remunerative opportunities available. Indeed, the average annual salary for lawyers in 2021 was $148,030. But they do suggest that law school is no longer—if it ever was—a guarantee of interesting work with a high salary.

SOURCES: Websites of the American Bar Association, at www.americanbar.org/aba/html and the U.S. Department of Education, at https://studentloanhero.com/calculators/state-loan-payment-calculator/.

The American Legal Profession

Size The United States today is home to more than one-quarter of the world's lawyers, with more lawyers—and more lawyers per capita—than any other country. The proliferation of lawyers in the United States can be attributed in part to the nation's economic development. Economic activity tends to generate business for lawyers; thus, the nation's percentage of the world's lawyers is similar to its percentage of the world's gross national product.[14]

But economic activity alone cannot explain the size of the American legal profession. Some advanced industrial countries get along with far fewer lawyers. Japan, for example, has fewer than 20,000 attorneys—fewer than are graduated by American law schools in a single year—although efforts are underway to double the number of attorneys in order to serve smaller towns and rural areas.[15] In addition, whereas economic growth in the United States has been fairly steady, the size of the American legal profession has fluctuated, alternating between periods of rapid growth—such as the late nineteenth and late twentieth centuries—and periods of relative stability. Nor can the increasing number of lawyers be attributed merely to the burgeoning legal demands of an increasing population; in recent years, growth in the size of the legal profession has far outstripped population growth. For example, in 1960, there were 1.58 lawyers for every 1000 Americans; but by 2010, there were 4.0 for every 1000 Americans. In comparison, in the United Kingdom there were 2.5 per 1000 persons, and in Germany 1.5 per 1000 persons.[16]

Composition Changes have also occurred in the composition of the legal profession. One obvious effect of recent trends has been a decline in the median age of those practicing law. This generational change may affect the political perspective of the legal profession, as expressed by the ABA and other legal institutions. Further, with a smaller proportion of the profession closer to retirement age, future increases in the number of attorneys are unlikely to be offset by retirements or deaths within the profession.

The recent influx of lawyers also reflects the collapse of many barriers to admission for previously excluded groups. The largest increase has been in the number of female attorneys. In 1869, Arabella Mansfield of Iowa became the first woman admitted to the practice of law, but many states did not allow women to practice law for most of the nineteenth century; and the U.S. Supreme Court ruled that the exclusion of women did not violate their constitutional rights.[17] By 1910, however, only Arkansas and Georgia persisted in excluding women; and by

1920 women constituted 1.4 percent of the legal profession. In 1918, Mary Florence Lathrop became the first woman member of the ABA. Law schools also discriminated, either by denying women admission—Harvard Law School did not admit women until 1950—or by capping female enrollments.[18] The combination of overt discrimination and cultural and social barriers limited women's presence in law school (the class of 1968 at the University of Virginia Law School included only three women) and, because law school had become the only avenue of entry to the legal profession, in the profession itself. As of 1970, women made up less than 5 percent of the legal profession.[19]

Since that time, a revolution has occurred. Between 1960 and 2023, the enrollment of women in ABA-approved law schools increased dramatically. Today, more than 27 percent of American lawyers are women, and this percentage will increase as current and prospective female law students enter the profession. In 2016 for the first time female law students outnumbered male law students, and that trend continues to the present day. In 2021 there were 64,861 female law students and 52,058 male law students.

Dramatic gains have also been registered by members of racial and ethnic minorities. African Americans suffered systematic discrimination in the legal profession, as elsewhere, well into the twentieth century. For instance, when the ABA discovered in 1914 that it had inadvertently admitted three black lawyers, it "persuaded" them to resign and refused thereafter to admit black lawyers until 1943.[20] Howard University Law School, established in 1868, ensured that African Americans were not completely excluded from legal education, but segregation remained a formidable barrier for prospective black lawyers until the 1960s. As of 1970, African Americans made up only 1.3 percent of the legal profession.

Since that time, law schools have made concerted efforts to attract qualified minority group members, and to a considerable extent they have succeeded. Enrollments of minority students in ABA-approved law schools rose from 8.6 percent in 1978 to more than 32 percent in 2021. However, in an era of intense competition for admissions, law schools' use of affirmative action programs to recruit minority students has provoked controversy. In 1996, voters in California approved Proposition 209, which prohibited affirmative action in admissions. And after the Supreme Court in *Grutter v. Bollinger* (2003) upheld an admissions program at the University of Michigan Law School that took race into account, Michigan voters adopted a similar initiative outlawing the use of race in admissions.[21] In 2023 the Supreme Court ruled unconstitutional the use of race as a factor for admissions to colleges and universities, including law schools.

The Organization of the Legal Profession

The oldest and most important national legal organization is the American Bar Association (ABA). Membership in the ABA is voluntary, and fewer than half of the nation's lawyers join. High-status lawyers and members of large law firms are disproportionately represented in its ranks. The ABA exercises no direct authority over individual lawyers or the state bar associations that regulate the legal profession, but it conducts a wide range of activities and, as the recognized voice of the legal profession, exerts considerable influence. As Chapter 3 described, the ABA's Standing Committee on the Federal Judiciary historically played a key role in evaluating the qualifications of prospective federal judges, and nominees who received an "unqualified" rating from the committee were unlikely to be confirmed. However, the ABA's role in the selection of federal judges has in recent decades been severely curtailed during Republican presidencies.

The ABA may also take formal positions on legal or political issues and lobby on behalf of those positions. It has been particularly outspoken on issues that directly affect the legal profession, such as lawyer advertising, government-funded legal services for the poor, and the financing and conduct of judicial elections. In addition, the ABA commissions reports that may influence political debate or the behavior of lawyers. The ABA Model Code of Judicial Conduct is a prime example. Finally, the ABA supervises legal education through its power to accredit—or not accredit—law schools.

Because the states control admission to the legal profession, state bar associations are also important. Although membership in some state bar associations is voluntary, more than 30 states have an "integrated bar." This means that all persons admitted to the bar in the state must belong to the state bar association. These state bar associations generally exercise less political influence than the ABA. They tend to be less concerned with political lobbying than with admission to the legal profession in the state, continuing education of the state's lawyers, and disciplining attorneys guilty of illegal or unprofessional conduct.

PRACTICING LAW

An Overview of Legal Practice

Major changes have occurred not only in the size and demographics of the legal profession but also in the types of legal practice. During the settlement of the American West, when frontier areas were sparsely populated, judges rode circuit to hold court in various locations, and lawyers often accompanied them, providing representation for those who had awaited the judge's arrival to settle their disputes. As a commentator

TABLE 4.1 Private Practitioners and Their Law Firms

Firm Size (No. Lawyers)	Number	Private Practitioners (%)
2	37,698	11
3	25,963	7
4	19,522	6
5	16,052	5
6–10	45,549	13
11–20	40,108	11
21–50	40,936	12
51–100	26,279	8
100+	95,892	28

SOURCE: Clara N. Carson, *The Lawyer Statistical Report: The U.S. Legal Profession in 2000* (Chicago, IL: American Bar Foundation, 2004), p. 8, table 8.

of the era described it, "The lawyer would, perhaps, scarcely alight from his horse when he would be surrounded by two or three clients requiring his services."[22] As the nation's population spread, so did lawyers. Wherever a community grew up, a lawyer would also settle and set up his office, handling whatever legal business came his way. Thus, the typical nineteenth-century lawyer was a nonspecialized solo practitioner, serving a wide diversity of clients and legal needs. As late as 1872, only one American law firm had as many as six lawyers.[23]

In the twenty-first century, the nonspecialized solo practitioner has become the exception rather than the rule.[24] Almost one-fifth of all lawyers are employed by government or private industry. Even among private practitioners, less than one-third have solo practices, and a quarter work in firms with more than 20 lawyers (see Table 4.1). Far more than in the past, lawyers are employees rather than autonomous professionals.

Types of Legal Practice

The Elite Law Firm Imagine defending Microsoft against an antitrust suit with billions of dollars at stake; helping the Chrysler Corporation negotiate federal guarantees for loans to avoid bankruptcy; fighting to stave off a hostile takeover of Kennecott Copper; or guiding the first stock issue of Genentech, a major genetic engineering company, which would generate $35 million in working capital.[25] The high stakes, the powerful clients, and the intense pressures and rich rewards that accompany representing such clients all define the world of the elite law firm.

The large, elite firms primarily represent the nation's major economic institutions, such as corporations, banks, insurance companies, and other powerful financial enterprises. Not surprisingly, then, many of these firms have home offices in New York. However, elite firms today are no longer identified with a single locale; they establish branch offices in other major U.S. cities, have offices overseas as well, and in many instances have merged with elite law firms in other countries. As a senior partner at one firm explained, "Corporations are multinational, our U.S. corporate clients have significant opportunities overseas, our competition has set up offices there, and we have to do the same thing to meet the competition."[26]

The size of successful firms has increased dramatically in recent years, in part through the acquisition of other law firms. In 1968, there were only 20 firms that employed as many as 100 lawyers; but by 2011 the United States had four firms with more than 2000 lawyers and 12 with more than 1000 lawyers.[27] Within these large firms, a clear hierarchy exists. Atop the hierarchy are the senior partners, who manage the firm and determine the division of profits at year's end. They are followed in descending order by junior partners, permanent associates who remain with the firm after being bypassed for partner, and associates. The most important distinction is between partner and associate. The elite firms recruit the most promising graduates, those with top grades and membership on the law review, from the nation's most prestigious law schools. These graduates start with annual salaries that may top $200,000. As associates, these young attorneys work under the direction of a partner, gradually advancing from apprenticeship to increased autonomy. The work is demanding, and associates know that only about a tenth of them will receive partnership offers. One Wall Street lawyer described his typical workweek as "being in the office ten, twelve, sometimes more hours a day five days a week and then a number of hours in the office on Saturday or Sunday or both."[28] According to one commentator: "The mega-firms are known for making their money off of the backs of their bright young lawyers. They work ungodly hours and are at the beck and call at all times of senior associates and partners who control their lives. Their work is often pure drudgery. They do the grunt work and rarely get into court."[29]

What these large firms claim to offer their clients is the perfection of the legal craft: a combination of legal talent and specialized expertise that ensures "no stone is left unturned, no matter how seemingly insignificant, and with virtually no regard for time or money." Of course, this dedication and legal expertise is expensive. Elite firms may bill their clients more than $1000 an hour for the time of a senior partner and as much as $400 an hour for the work of an associate. But these figures purchase extraordinary devotion. During the Kennecott Copper takeover fight, for instance, "the lawyers at Sullivan & Cromwell didn't have a day off from Thanksgiving 1980 to the end of January 1981, including the holidays."[30] When legal disputes involve millions of dollars, companies are quite willing to pay premium prices for top-flight legal work.

Solo Practice At the opposite end of the spectrum from the large law firm is the solo practitioner, who epitomizes the ideal of the independent professional and thus occupies an honored place in the mythology of the legal profession. Certainly, the prospect of being one's own boss and choosing one's own clients attracts some attorneys to solo practice. Social or other barriers may prevent a lawyer from pursuing other sorts of law practices. An early study described "the individual practitioner of law [as] a self-made man who came up the hard way from poor, immigrant surroundings" by attending the local law school, usually at night.[31] When neither his social background nor the quality of his legal education recommended him to major law firms, he became a solo practitioner.

The number of solo practitioners has declined in recent decades, particularly in urban areas, because corporations and other businesses tend to deal with their legal problems in-house or to take them to law firms with specialized expertise. As a result, solo practitioners are often "confined to those residual matters (and clients) that the large firms have not preempted," serving the legal needs of middle-class and blue-collar clients.[32] These legal concerns generally involve personal business matters (personal real estate, personal tax, and probate) and personal plight concerns (criminal defense, divorce, general family practice, and personal injury claims).

Even in dealing with these problems, solo practitioners face increased competition. Taking advantage of Supreme Court rulings that have removed restrictions on advertising by lawyers, legal entrepreneurs have developed "legal clinics" that seek to provide routine legal services in simple matters such as wills, uncontested divorces, and demand letters to landlords. These firms have attracted a large clientele through aggressive television advertising and branch offices in convenient locations, such as shopping malls, and they have kept prices down by applying mass production techniques—standardization of services and organization of tasks—to the delivery of legal services. Solo practitioners have found it difficult to compete with the clinics' high-volume, low-price approach.[33]

Corporate Counsel More than 8 percent of lawyers currently work in private industry, frequently in firms involved in finance, insurance, real estate, communications, or manufacturing. Major corporations are most likely to employ lawyers and maintain large legal departments—Fortune 500 firms employ approximately 30 percent of all in-house counsel. The growth in corporate law offices represents an attempt by major companies to reduce legal costs by relying less heavily on elite law firms, at least for more mundane legal matters. Large corporations also recognize that, in the words of one board chairman, "The most active companies now require—or are best served by—the constant availability of counsel who [are] informed on a day-to-day basis of the company's activities and directions."[34] When large corporations do litigate, many still employ outside counsel.

From an attorney's perspective, there are both advantages and disadvantages to working in-house. On the one hand, house counsel are not their own bosses, and they may earn less than partners in a top law firm. On the other hand, corporate employment offers job security and a substantial income. For example, in 2011 Denise Keane, the general counsel at tobacco giant Altria Group, Inc., received salary and benefits totaling $6.5 million.[35] Moreover, as Catherine Rein, general counsel for The Continental Group, has observed, lawyers who work for a single client can see "the long-term effects of [their] legal advice, become part of a team, and can take continuing pride in [their] contribution."[36]

Government Attorney About 7 percent of attorneys are employed by federal, state, or local governments. Most of these work for state or local governments, with the largest number serving as prosecutors or public defenders (attorneys employed by the government to represent indigent defendants). About 40 percent of government attorneys work for the federal government, with large contingents found in the Justice Department and in the Internal Revenue Service. However, attorneys occupy positions in a wide array of departments and agencies.

The diversity of positions reflects the diverse responsibilities of government attorneys. Government attorneys dominate the practice of criminal law: they conduct all criminal prosecutions, and public defenders represent the vast majority of defendants. Government attorneys are also involved in civil litigation, initiating suits on behalf of federal, state, or local governments or defending those units against suits by private parties. In addition, the federal government supplies attorneys through the Legal Services Corporation (LSC) to represent the poor in certain civil cases. Still other government attorneys work outside the courtroom. Their responsibilities include drafting legislation or administrative regulations, administering government departments and programs, lobbying for governmental agencies before Congress, or helping them avoid legal problems.

Governmental service offers some advantages for attorneys. Lawyers in the public sector find a degree of job security and avoid the intense competition and job pressure characteristic of large law firms. While salaries hardly match those in large firms, they are respectable, particularly for junior attorneys. In addition, young attorneys may be given significant responsibilities in government earlier than in a large law firm. Of course, this may have its downside as well. According to one public defender, after only a day or two of orientation, he was told: "We're all attorneys and you handle the case any way you want to handle it, at your complete discretion. Just right on, brother, and good luck."[37] Nonetheless, many young attorneys gain valuable experience early in their careers through government employment, before moving into corporate work or private practice.

The migration from government to the private sector creates openings for newly minted attorneys. In addition, attorneys who have worked for the government often find their experience and expertise in demand by private employers or clients, and they end up representing the very groups they sought to regulate while in government service. One lawyer, when asked whether he felt any remorse about his shift in position, responded: "I have no qualms about changing sides. Will I be comfortable representing [business] in front of the [agency]? I can hardly wait! Certainly there are two sides to every story."[38]

The Divided Legal Profession

The discussion thus far has emphasized the diversity of clients that lawyers represent, the range of legal issues they address, and the varied contexts in which they practice law. Some observers argue that contemporary legal practice is not only diverse but also fundamentally divided. According to John Heinz and Edward Laumann, the American legal profession is divided into "two hemispheres": those who represent large organizations, primarily corporations, and those who represent individuals. They found:

> Lawyers who serve major corporations and other large organizations differ systematically from those who work for individuals and small businesses, whether we look at the social origins of the lawyers, the prestige of the law schools they attended, their career histories and mobility, their social or political values, their networks of friends and professional associations, or several other social variables .... [T]his fundamental difference in the nature of the client served appears to be the principal factor that structures the social differentiation of the profession.[39]

Does it matter that the legal profession is divided? According to Heinz and Laumann, this bifurcation has two negative effects: First, because the interests and perspectives of its members diverge so sharply, the legal profession cannot speak with one voice on the issues that affect it. Second, the division sends a troubling message about the orientation of the legal profession. All Americans are aware that inequalities of wealth and power exist. The bifurcation of the legal profession—with the most notable members of the legal profession serving the needs of corporate America, and a less prestigious group serving private persons—seems to reinforce those inequalities, raising questions about the availability of adequate legal services for the general public and equal justice for all.

ACCESS TO LEGAL SERVICES

The Nebraska Constitution provides that "[a]ll courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law."[40] Similar guarantees in other state constitutions reflect a commitment to the principle that all persons should have access to the courts for settling disputes and redressing injuries. Although litigants have the right to represent themselves, effective presentation of their claims often requires the services of an attorney; so may other commonplace activities, such as drawing up a contract or adopting a child. Yet purchasing the services of an attorney to resolve even routine legal problems can be expensive, and concern about costs may deter poor or middle-class people from consulting an attorney, even when they need legal assistance.

Government, the legal profession, and private groups have attempted to ensure that all members of society obtain the legal assistance they require. Let us look at the character and success of their efforts with regard to criminal justice and civil justice.

Criminal Justice

The Sixth Amendment to the U.S. Constitution guarantees to every defendant the right "to have the Assistance of Counsel for his defense." This guarantee permits those accused of a crime to hire counsel but does not expressly oblige the government to provide an attorney to indigent defendants. However, if the government fails to provide legal assistance, the result is an unequal system of justice. It may also interfere with the operation of the adversary system. Well-to-do defendants will hire counsel, thus ensuring a rough balance of legal expertise between prosecution and defense. But indigent defendants, unable to afford an attorney, will be forced to defend themselves, despite their lack of familiarity with the law and courtroom procedures; and so they are unlikely to mount a strong defense, even when they are innocent.

Because the effectiveness of the adversary system depends on a vigorous presentation of both sides, the imbalance of legal expertise between prosecution and defense in a case increases the possibility that innocent people will be convicted. Recognizing this, the U.S. Supreme Court in 1938 ruled that criminal defendants in federal courts had a constitutional right to representation by counsel, even if they could not afford to pay a lawyer.[41] Several states also recognized a right to counsel for indigent defendants as a matter of state law—Wisconsin did so as early as 1859.[42] However, the most important step toward securing equal justice for indigent defendants was *Gideon v. Wainwright* (1963), which extended the right to counsel to all felony defendants in state courts, where the bulk of criminal prosecutions take place.[43] In subsequent cases, the Supreme Court extended the logic of *Gideon* to guarantee legal representation for defendants in juvenile courts and for all defendants facing the possibility of imprisonment if convicted. In addition, recognizing that such procedures as police interrogations and lineups may determine the outcome of a case, the Court extended the right to counsel to the earlier stages of the criminal justice process as well.[44]

States have adopted three approaches to providing counsel for indigent defendants. Some have paid private attorneys on a case-by-case basis to represent defendants. But this approach has not worked well, because the rates that governments have paid have not been high enough to attract good lawyers. If all attorneys in a jurisdiction are obliged to take a turn at criminal defense, defendants may receive only perfunctory representation. Indeed, a study of homicide cases in New York City found that, in a third of the cases, court-appointed attorneys spent less than a week preparing the case.[45] Moreover, as one commentator observed, "Having tax attorneys and property lawyers tackle criminal cases is far from ideal. You don't ask a cardiologist to do your brain surgery."[46] Other states have contracted with attorneys or law firms to supply legal counsel in a large number of cases, offering them a set fee for the service. But this flat rate is profitable for the attorneys and firms under contract only if they limit the time and effort they devote to each case.

Many jurisdictions therefore have chosen to establish offices of government-employed defense attorneys (public defenders), which today defend more than 70 percent of criminal defendants. Yet public defender offices are chronically underfunded and understaffed, requiring public defenders to deal with huge, sometimes unmanageable caseloads. The problems tend to be particularly acute when governments are experiencing fiscal problems. For example, during the Great Recession, the Washington State Office of Public Defense suffered a 7.6 percent budget cut, and Minnesota was forced to lay off 15 percent of its public defender staff.[47] *Gideon* and other rulings have increased the fairness of American criminal justice by mandating legal representation for indigent defendants, but in actuality the promise of *Gideon* has only been partially kept.

Civil Law

Although the U.S. Constitution requires government to provide legal assistance for indigent defendants accused of crimes, it does not guarantee legal assistance in civil cases. (Some other countries mandate such assistance—indeed, Article 47 of the Charter of Fundamental Rights for the European Union states that "Legal Aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.") From time to time, however, most Americans require the services of a lawyer. They may need legal representation to sue for damages when they have been injured or for divorce when a marriage fails; they may also find themselves defendants in a civil suit; or they may need legal advice for business or personal matters. Yet many people find it difficult to obtain legal services. They may be concerned about costs, may be uncertain how to locate a lawyer, or may not understand the legal implications of the problems they confront. Government, the legal profession, and private groups have pioneered various approaches to ensure the availability of legal services.

Legal Aid Although there is no constitutional right to counsel in civil cases, government or private groups may provide an attorney for those who cannot afford one. The federal government's first involvement with legal aid for the poor grew out of the Freedman's Bureau during Reconstruction, when the bureau retained private attorneys to represent indigent African Americans in civil and criminal cases.[48]

During the late nineteenth century, several private legal aid societies were formed. Illustrative of these societies were *Der Deutsche Rechtsschutz Verein*, established by New York City's German Society to protect recent German immigrants, and the Protective Agency for Women and Children, created by the Women's Club of Chicago to combat the "seductions and debaucheries of young girls under guise of proferred [sic] employment."[49] By 1919, legal aid societies were operating in 41 cities, but they lacked the resources to serve all the legal needs of the poor.

The federal government's involvement in legal aid grew out of the "War on Poverty" launched by President Lyndon Johnson. The Legal Services Program (LSP), established in 1965, encouraged the formation of local legal aid agencies to serve the poor through grants that covered the costs of their operations. These local agencies retained considerable discretion in deciding how best to serve the needs of their clientele. Some local LSP agencies emphasized solving the legal problems of individual clients, following the approach of legal aid societies in the past, although their greater resources permitted them to assist more poor people and take more cases to court. Other local agencies emphasized law reform, challenging laws and policies that they believed disadvantaged the poor.

Such challenges, usually referred to as "impact cases," typically entailed more time and effort than the resolution of individual disputes and often involved appellate litigation. Not surprisingly, these law reform efforts were controversial. Critics charged that they reduced the number of clients served, created the odd phenomenon of one part of government suing another, and permitted left-wing lawyers to politicize the LSP by pursuing their own political agendas under the guise of helping the poor.[50]

The political controversy over the LSP led Congress in 1974 to reconstitute it as the Legal Services Corporation (LSC), and it continues in this form to the present day. The LSC functions as a nonprofit corporation, providing funds by grant or contract to legal service programs in all 50 states, with the majority going to field offices located throughout the country. Nonetheless, like its predecessor, the LSC has been mired in political controversy. During the 1980s, Presidents Ronald Reagan and George H. W. Bush both sought to abolish the LSC, but Congress refused to go along. However, appropriations for the LSC were slashed, and both presidents named outspoken critics of the LSC to its board of directors. With the election of conservative Republican majorities in both houses of Congress in 1994, the attack on the LSC intensified. Congress in 1996 cut its budget by more than $100 million and specifically prohibited LSC attorneys from engaging in lobbying, initiating class action suits, representing prison inmates, or undertaking court action to block changes in federal or state welfare systems. According to the LSC's defenders, these restrictions crippled its efforts to represent the poor effectively; but to its most outspoken critics, even these restrictions did not go far enough in depoliticizing the LSC. In 2001, the U.S. Supreme Court ruled that the federal ban on LSC funding to any organization that represented clients involved in challenging existing welfare law violated the First Amendment.[51] In 2017 President Donald Trump proposed eliminating funding for LSC, but Congress was once again unwilling to do so. With the election of President Joe Biden, the LSC's funding was increased.

About 50 million Americans have household incomes below 125 percent of the poverty threshold and are thus eligible for LSC legal services. Common legal problems they confront involve family issues, such as divorce, child support, spousal abuse, and custody and visitation rights. Others involve conflicts over housing matters, such as landlord–tenant disputes, and over government benefits, such as veterans' benefits and unemployment. But the LSC estimates that the organizations it funds are unable to provide any or enough assistance for roughly 1.4 million civil legal problems annually. Whether the American commitment to legal aid is adequate is particularly controversial when viewed in comparative perspective. For example, whereas the United States budgets $2.25 per capita for civil legal aid, England budgets $32, and New Zealand, $12.[52] Indeed, a recent study ranked the United States 67th out of 97 countries in terms of access to justice and the affordability of legal services.[53]

Legal Clinics Legal clinics are high-volume private law firms that seek to provide routine legal services for large numbers of clients at low cost. Their number increased dramatically during the 1970s: in 1974, there were only eight law clinics; by 1980 there were about 800; and they have grown exponentially ever since.[54] The development of legal clinics was stimulated by Supreme Court rulings that opened the door to aggressive price competition within the legal profession. In *Bates v. State Bar of Arizona* (1977), the Supreme Court ruled that the First Amendment protected the right of lawyers to advertise their prices for legal services; and in *Goldfarb v. Virginia State Bar* (1975), it struck down minimum fee schedules established by bar associations as a violation of federal antitrust laws. These rulings freed legal entrepreneurs to attract clients by price advertising and claims of less expensive legal services than their competitors—"sheer shysterism," according to Chief Justice Warren Burger.[55]

Legal clinics can charge lower rates in part because of economies of scale. Although they frequently locate branch offices in neighborhoods or malls for the convenience of their clients, legal clinics are among the largest law firms in the United States. Even more important, these clinics cut personnel costs by relying on paralegals, rather than lawyers, for routine tasks and by employing standard forms for common legal procedures. Many clinics have prospered by focusing on common problems such as divorces, wills, personal bankruptcy, and preparation of tax returns.

Legal clinics primarily attract middle-class and working-class clients. While they have introduced competition into the provision of legal services, it is unclear whether they have increased the availability of lawyers to those who would not otherwise use their services. Legal clinics may merely have displaced traditional firms, redistributing business within the legal profession.

Technology and the Provision of Legal Services Like the members of other professions, lawyers have sought to establish a state-enforced monopoly over the provision of their professional services and to prevent nonlawyers from providing legal services. To a large extent, they have succeeded: many states mandate that only lawyers may provide legal advice, draft wills, transfer property titles, and represent persons before administrative agencies. Such laws maintain the high cost of legal services by restricting competition to those who have law degrees. The legal profession has justified the restrictions as necessary to protect the public, arguing that only attorneys have the expertise to provide competent legal assistance. But critics charge that the restrictions primarily serve the interests of the legal profession. Legal clinics' intensive use of paralegals for tasks traditionally undertaken by lawyers does suggest that trained nonlawyers can perform some of the tasks currently undertaken by lawyers.

Technological advances have made legal information and legal services more readily available to the general public. Lawyers once monopolized legal research, not only because of their legal skills but also because only they had access to the pertinent case reports and legal materials. But today these rulings and legal materials are readily available via the internet. Lawyers also monopolized the provision of legal advice, but now websites provide a great deal of information and guidance. Finally, lawyers monopolized the creation of legal documents, but now people may bypass attorneys in drafting wills, contracts, and other documents by relying on LegalZoom or other document preparation services. Governments too have become involved—California, for example, has posted online a form for wills that is simple enough to allow most people to draft their own.

Although these self-help materials may reduce legal costs for those who use them, they are useful primarily for simple and routine legal matters and not for the resolution of disputes. Thus they offer only a partial answer to the problem of access to justice.

Contingent Fees Potential litigants may fail to consult a lawyer because they fear that the damages awarded may not cover the legal fees and court costs associated with their cases. To remove this disincentive to pursue legal claims, the American legal system has developed the contingent fee, which displaces the financial risk from the client to the lawyer. Under a contingent fee arrangement, the attorney fronts the costs of the litigation and receives an agreed-upon percentage (often one-third) of the award or settlement in the case, plus reimbursement of the costs incurred. If the lawyer's efforts net the client a large award, the lawyer shares in the good fortune. However, if the client receives nothing, neither does the attorney. Thus, a contingent fee is much like the commission paid to a real estate broker, who receives no fee if the property does not sell.

The contingent fee arrangement makes sense for a lawyer only when the prospect of a substantial fee outweighs the risk of no fee at all. Often attorneys have a portfolio of cases that involve varying risks and payoffs. Contingent fee arrangements are most frequent in personal plight cases—for example, when clients are suing because of injuries sustained in an accident or as the result of defects in a product they purchased. Although there is a degree of risk and uncertainty in such cases, often the question is not whether the plaintiff will obtain damages but rather the size of the award or settlement.

Contingent fees are controversial. Critics charge that they encourage frivolous suits because plaintiffs bear no financial risk. They also claim that contingent fees may create a conflict between the interests of the attorney and the client. Attorneys operating under a contingent fee arrangement may be tempted to settle cases, thereby obtaining some reward for their efforts, rather than take them to trial, which is expensive and poses the risk of losing both the case and their fees. Furthermore, contingent fees allow attorneys to receive extremely high fees for relatively little work when they negotiate large settlements in straightforward personal injury cases.

Proponents counter that most criticism of contingent fees is self-interested, coming from attorneys who represent insurance companies, corporations, and other defendants in personal injury cases rather than from plaintiffs in personal injury cases. More substantively, they insist that, without contingent fees, average citizens would often not bring cases, even when they had suffered real injuries. They also deny that lawyers receive unduly high contingent fees. Such claims, they maintain, rely on a few atypical cases and ignore the risk that attorneys bear under contingent fee arrangements.

Although no jurisdiction has outlawed contingent fees, some have sought to regulate them. For example, the New Jersey Supreme Court has established a graduated scale of maximum permissible contingent fees, with attorneys receiving no more than 20 percent of any award above $1,500,000.

Group Legal Services Group legal services (GLS) plans are a form of legal insurance, under which group members pay a premium that entitles them to various legal services. GLS plans vary in how they provide services. Under open-panel plans, GLS members can seek legal services from a wide range of lawyers. Under a closed-panel plan, members "can consult only lawyers (sometimes a single firm) who belong to the plan and have agreed to accept a schedule of fees, generally below the market rate."[56]

Such prepaid plans originated early in the twentieth century, when the Physicians' Defense Company and automobile clubs began to offer legal services or coverage of legal fees for subscribing members. But opposition from the ABA limited experimentation with group legal services until the 1970s. Promoting the renewed interest in group legal plans were a series of Supreme Court rulings during the 1960s that held that restrictions could not be placed on group efforts to ensure legal representation for their members.[57] Thus, associations could offer prepaid legal plans to their members, and unions could seek coverage for their members in collective bargaining. By the early twenty-first century, more than 30 percent of Americans had some form of coverage.

Pro Bono Work The ABA's Model Rules of Professional Conduct state that attorneys have an obligation to perform *pro bono* work—that is, to undertake legal work without compensation for the economically disadvantaged or for charitable causes. (The term *pro bono* comes from the Latin *pro bono publico*, "for the public good.") Much of this work is undertaken through *pro bono* and other private bar involvement programs. Other attorneys perform *pro bono* services through their law firms or as solo practitioners. Nevertheless, this professional obligation is self-enforced, and many attorneys engage in little or no *pro bono* work. Thus, in a 2016 ABA study, 48 percent of respondents indicated that they had done no *pro bono* work in the previous year.[58]

The ABA recommends that attorneys devote 50 hours per year to *pro bono* work—less than one hour per week. Some state and local bar associations have gone further, imposing *pro bono* requirements on all attorneys. These requirements are controversial; some attorneys have even argued that they violate the Thirteenth Amendment ban on involuntary servitude. Thus, it is hard to argue with a commentator who concluded: "Although pro bono activities undoubtedly help the particular recipients and ease the consciences of lawyers, they do relatively little to fulfill the promise of equal justice."[59]

LAWYERS AND CLIENTS

In an adversary system, lawyers are expected to represent the interests of their clients. Attorneys who fail to do so risk serious penalties. Those who provide inadequate or incompetent assistance can be sued for malpractice; and those who are dishonest—who, for example, steal or make use of money entrusted to them—are subject not only to criminal prosecution but also to discipline by the state bar association. In serious cases, a lawyer may be disbarred—that is, prohibited from practicing law again.

For attorneys who are neither incompetent nor dishonest, the perplexing issue remains: How does one serve the interests of one's client? The answer is inevitably tied up with the question of the proper relationship between lawyer and client. Historically, this relationship has resembled the traditional relationship between doctors and patients or between other professionals and their clients.[60] The client seeks the counsel of the professional and puts the matter in his or her hands, relying on the professional's expertise and judgment. Thus, the professional has full autonomy in deciding how best to advance the client's interests. The assumption is that the interests of both parties are best served by this arrangement.

In recent years, however, this model of professional dominance has been challenged. In medicine, this is reflected in the development of the notion of informed consent: Physicians should explain the various options available to patients and proceed with a course of treatment only after receiving their consent. In law, too, the idea of a more collaborative relationship between lawyer and client has gained currency. Proponents of this more cooperative approach suggest that clients should consider, along with their lawyers, such matters as "whether to sue at all, the ground rules of the lawyer's and client's mutual contact, the lawyer's fee, the preparation of the case, the best time to sue, whether to seek a jury trial or special trial preference, various issues of settlement strategy, and the preparation for examination before trial."[61] However, as the relationship between professional and client becomes more collaborative, defining the responsibilities of each becomes more difficult.

The appropriate relationship between lawyer and client is particularly difficult to determine in political litigation, where the aim is not merely to vindicate the interests of a single person but also to establish a legal principle of benefit to a larger group. Political litigation poses fundamental questions: Who is the lawyer's client, and whose interests should be given priority? Consider *Brown v. Board of Education*, the famous school desegregation case. Thurgood Marshall and the NAACP's Legal Defense Fund had undertaken a protracted campaign to overturn laws mandating segregation in schools and other public facilities. As part of the campaign, they actively sought out clients willing to serve as vehicles for challenging discriminatory laws. In *Brown*, which represented the culmination of this struggle, the NAACP recruited Oliver Brown, whose daughter attended a segregated school in Topeka, Kansas, to serve as plaintiff. The decision to litigate, the selection of plaintiffs, the choice of when and where to sue, and the decision as to how to frame the legal issues all remained in the hands of Thurgood Marshall and his associates.

As this account suggests, the relationship between lawyers and clients is far different in political litigation than in ordinary litigation. Lawyers in political litigation may actively seek out clients to act as parties to a suit, rather than merely provide a service to those who consult them. Moreover, the lawyers' willingness to initiate suit or file an appeal, as well as the strategy pursued during the litigation, will depend upon how such action will advance the interests of the group, not those of the individual litigant. As long as the "client" understands and accepts this, as is usually the case when a group pursues a litigation strategy, no problem arises.

However, it may happen that the remedy desired by the lawyer in political litigation may diverge from that preferred by clients. In the aftermath of *Brown*, for example, a gap at times developed between the belief of civil rights lawyers in the importance of school integration and the desire of clients—parents and children—for educational improvement, whether in a segregated or an integrated setting. Similarly, in mental health litigation, some lawyers sought to establish a "right to treatment," whereas most residents in institutions preferred a "least restrictive alternative" suit that would release them from the institution to a community-based mental health facility.[62] Or the choice may be between pressing for a legal ruling that could conceivably benefit a large number of persons or accepting a settlement beneficial to one's client, as when the government agency being sued offers a settlement that will satisfy the client's particular concern without establishing a binding precedent. In circumstances such as these, lawyers may well wonder how to balance competing interests and whose interests should be given the greater weight.

The appropriate relationship between lawyer and client is even more complicated when the lawyer engaged in law reform litigation is affiliated with a legal services agency funded by the LSC. Critics charge that legal services lawyers in "impact cases" dominate the relationship with their clients. Instead of advancing clients' interests as they define them, the lawyers "use their clients as mere instruments for enacting their own political agendas."[63] Furthermore, if legal services lawyers claim to be serving a group beyond the individual client, exactly what is that group? If it is the poor in general, on what basis can the lawyer claim to represent their interests, and who gave the lawyer authority to speak for them? Moreover, because LSC lawyers work for the government, how can they justify pursuing policies in political litigation—such as increased welfare benefits or siting public housing in middle-class neighborhoods—that diverge from the policies endorsed by the government? In sum, critics contend that the law reform activities of legal services lawyers go beyond even the traditional relationship between lawyer and client, because lawyers may expect their clients to defer not only to their expertise regarding how to serve the clients' interests but also to their view of what those interests are.

Because of these concerns, many LSC attorneys rarely engage in political litigation, preferring to serve the day-to-day legal problems of individual clients.[64] Other LSC attorneys, however, dismiss the benefits obtained through such legal work as "Band-Aids" and insist that real advances for the poor come through political litigation.[65] These lawyers claim that the close ties they maintain with community groups keep them informed about the interests of their real clients, the poor of the community. Thus, they deny that they are unilaterally imposing their views on their clients. Even when they seek out plaintiffs to pursue issues or aggregate individual complaints into broad-based legal attacks on the practices or policies of a government agency, they insist that it is the community's interests they are seeking to advance. The concern voiced about lawyer domination of poor clients, they argue, is insincere; those who voice the concern are really distressed by the success of the aggressive tactics employed by LSC attorneys.

THE TRANSFORMATION OF THE AMERICAN LEGAL PROFESSION

This chapter has shown that the American legal profession today differs from its counterparts in other countries in its training, size, and the ways in which it organizes itself and delivers legal services. The contrast with other countries, however, is no sharper than the contrast with the American past, as the transformation of American legal education illustrates. To become a lawyer in the United States today, a college graduate must survive an increasingly selective admissions process for law school and complete three years of rigorous academic training. Every element of that description represents a change from the past. The current emphasis on academic studies in a university setting marks a departure from the nation's first century, when apprenticeship was the most common form of legal training. Until well into the twentieth century, graduation from college was not a requirement for law school—indeed, some law schools accepted students who did not even have high-school diplomas—and some graduated students after as little as a single year of study. Only recently has admission to law school become fiercely competitive.

A transformation has also occurred in the composition and size of the American legal profession. Initially, the practice of law was largely confined to a relatively small group of native-born white males. But in the late nineteenth century, new groups—women, racial minorities, and immigrants—began to seek admission to the legal profession. Despite legal and social barriers, these groups had gained a tenuous foothold by the early twentieth century. Only within the last few decades, however, have women and racial minorities become a sizable presence within the American legal community. Indeed, the dramatic expansion of the American legal profession in large part reflects the opening of the profession to previously excluded or marginalized groups. The number of lawyers may shrink in response to reduced demand for legal services, but this should not affect the diversity of the legal profession.

Finally, a transformation has occurred in the practice of law and the delivery of legal services in the United States. For most of the nation's history, the typical lawyer was a solo practitioner or a partner in a very small firm. But developments over the last half-century have altered the practice of law. First, the number of large law firms has increased dramatically, as has the size of those firms, with the largest firms employing more than 2000 attorneys in branch offices throughout the nation and abroad. Second, corporations and governments at all levels now hire far more lawyers than in the past. As a result, attorneys today increasingly are employees rather than autonomous professionals. Third, governmental officials and the legal profession have recognized that segments of the American public cannot normally afford the legal services they need. This recognition has led to government programs designed to provide legal aid, such as public defender programs and the Legal Services Corporation. It has also led the legal profession to introduce innovations designed to attract new clients by making legal services more affordable. Such innovations as legal clinics, the contingent fee, and prepaid legal services have altered the way legal services are delivered and paid for. How successful these efforts to increase the accessibility of legal services have been, and to what extent they have given reality to the goal of equal justice for all, remains a matter of dispute.

NOTES

1 John C. Jeffries Jr., *Justice Lewis F. Powell Jr.: A Biography* (New York: Charles Scribner's Sons, 1994); and Juan Williams, *Thurgood Marshall: American Revolutionary* (New York: Times Books, 1998).

2 On the distinction between attorneys as "delegates" and as "trustees," see Susan E. Lawrence, *The Poor in Court* (Princeton, NJ: Princeton University Press, 1990), chap. 1.

3 Survey results are available at https/://news.gallup.com/poll/1654:Honesty-Ethics-Professions.aspx.

4 American Bar Association Code, EC7-19, quoted in David Luban, *Lawyers and Justice* (Princeton, NJ: Princeton University Press, 1988), p. 51; and an unnamed lawyer, quoted in Jennifer L. Pierce, *Gender Trials: Emotional Lives in Contemporary Law Firms* (Berkeley: University of California Press, 1995), p. 59.

5 See Christian Dadamo and Susan Farran, *The French Legal System*, 2nd ed. (London: Sweet & Maxwell, 1996); and Richard L. Abel, "England and Wales: A Comparison of the Professional Projects of Barristers and Solicitors," in *Lawyers in Society: The Common Law World*, vol. 1, Richard L. Abel and Philip S. C. Lewis eds. (Berkeley: University of California Press, 1988).

6 Robert Stevens, *Law School* (Chapel Hill: University of North Carolina Press, 1983), chap. 1.

7 Lawrence M. Friedman, *A History of American Law*, 3rd ed. (New York: Simon and Schuster, 2005), p. 237.

8 The discussion of Langdell relies on Stevens, *Law School*, chaps. 3–4.

9 Richard L. Abel, *American Lawyers* (Oxford: Oxford University Press, 1992), p. 41.

10 Benjamin H. Barton, *Glass Half Full: The Decline and Rebirth of the Legal Profession* (New York: Oxford University Press, 2015), p. 135.

11 Abel, *American Lawyers*, p. 59.

12 See https//law.yaleedu/admissions/profiles-statistics/.

13 Data reported in this chapter on law school enrollments and on the legal profession more generally are drawn from the ABA Profile of the Legal Profession 2022, at www.americanbar.org/content/dam/aba/administrative/news/2022/07/profile-report-2022.pdf .

14 On the connection between economic activity and the size of the legal profession, see Terrence C. Halliday, "Six Score Years and Ten: Demographic Transitions in the American Legal Profession," *Law and Society Review* 20 (1986): 65–70.

15 Norimitsu Onishi, "Lawyers in Rural Japan: Low Supply, Iffy Demand," *New York Times*, July 29, 2008, at http://www.nytimes.com/2008/07/29/world/asia/29japan.html.

16 Figures on the United Kingdom and Germany are reported in Steven J. Harper, *The Lawyer Bubble: A Profession in Crisis* (New York: Basic Books, 2013), p. 9.

17 *Bradwell v. Illinois*, 83 U.S. 130 (1873).

18 Abel, *American Lawyers*, p. 90.

19 Nancy L. Buc, "A Washington Lawyer: Using Government Experience in Private Practice," in *Women Lawyers: Perspectives on Success*, Emily Couric ed. (New York: Harcourt Brace Jovanovich, 1984), p. 50; and Cynthia Fuchs Epstein, *Women in Law* (New York: Basic Books, 1981), p. 4.

20 Abel, *American Lawyers*, p. 100.

21 *Grutter v. Bollinger*, 539 U.S. 306 (2003).

22 Quoted in Friedman, *History of American Law*, p. 309.

23 Gerard W. Gawalt, ed., *The New High Priests: Lawyers in Post-Civil War America* (Westport, CT: Greenwood Press, 1984), p. 7.

24 Data are drawn from Clara N. Carson, *The Lawyer Statistical Report: The U.S. Legal Profession in 2000* (Chicago, IL: American Bar Foundation, 2004).

25 With the exception of the Microsoft case, these examples are drawn from James B. Stewart, *The Partners* (New York: Simon and Schuster, 1983).

26 Quoted in John P. Heinz et al., *Urban Lawyers: The New Social Structure of the Bar* (Chicago, IL: University of Chicago Press, 2005), p. 281.

27 See "America's Largest Law Firms," at http://www.ilrg.com/nlj250/.

28 Frederic Block, *Disrobed: An Inside Look at the Life and Work of a Federal Trial Judge* (Eagan, MN: West, 2012), p. 161.

29 Milton C. Regan, Jr., *Eat What You Kill: The Fall of a Wall Street Lawyer* (Ann Arbor: University of Michigan Press, 2004), p. 52.

30 Stewart, *The Partners*, pp. 14, 281.

31 Jerome E. Carlin, *Lawyers on Their Own* (New Brunswick, NJ: Rutgers University Press, 1962), p. 1.

32 Ibid., p. 17.

33 Relevant rulings include *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988). On the development and effects of legal clinics, see Jerry Van Hoy, "Selling and Processing Law: Legal Work at Franchise Law Firms," *Law & Society Review* 29 (1995): 703–729.

34 Quoted in Eve Spangler, *Lawyers for Hire* (New Haven, CT: Yale University Press, 1986), p. 71.

35 "The 2011 GC Compensation Survey," at http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202500716658.

36 Catherine A. Rein, "As Corporate General Counsel: Hierarchies with Few Women at Top," in *Women Lawyers*, Emily Couric ed., p. 125.

37 Quoted in Milton Heumann, *Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys* (Chicago, IL: University of Chicago Press, 1977), p. 55.

38 Quoted in Spangler, *Lawyers for Hire*, p. 112.

39 John P. Heinz and Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (New York: Russell Sage Foundation and American Bar Association, 1982), pp. 319–320.

40 Nebraska Constitution, art. 1, sec. 13.

41 *Johnson v. Zerbst*, 304 U.S. 458 (1938).

42 *Carpenter v. Dane*, 9 Wis. 249 (1859).

43 *Gideon v. Wainwright*, 372 U.S. 335 (1963).

44 On the right to representation at trial, see *In re Gault*, 387 U.S. 1 (1967), and *Argersinger v. Hamlin*, 407 U.S. 25 (1972); on the right to representation before trial, see *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966).

45 Jane Fritsch and David Rohde, "Legal Help Often Fails New York's Poor," *New York Times*, April 8, 2001, at http://www.nytimes.com/2001/04/08/nyregion/08LAWY.html.

46 Quoted in Karen Houppert, *Chasing Gideon: The Elusive Quest for Poor People's Justice* (New York: The New Press, 2013), p. 159.

47 Ibid., pp. 51 and 154.

48 On the development of legal aid for the poor, see Lawrence, *The Poor in Court*; and Francis Regan, Alan Paterson, Tamara Goriely, and Don Fleming, eds., *The Transformation of Legal Aid: Comparative and Historical Studies* (New York: Oxford University Press, 1999).

49 Lawrence, *The Poor in Court*, p. 18.

50 See Earl Johnson, Jr., "Justice and Reform: A Quarter Century Later," and John Kilwein, "The Decline of the Legal Services Corporation: 'It's ideological, stupid!' " in Regan et al., *Transformation of Legal Aid*.

51 *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001).

52 These data are drawn from the Justice Gap Report, at www.lsc.gov/media-center/publications/2017-justice-gap-report#bfrtoc-the-2017-justice-gap-report.

53 Survey of the World Justice Project, discussed in Deborah L. Rhode, *The Trouble with Lawyers* (New York: Oxford University Press, 2015), p. 30.

54 See Abel, *American Lawyers*, p. 138, and Paul Wice, *Judges and Lawyers: The Human Side of Justice* (New York: Harper Collins, 1991), pp. 75–76.

55 *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). Burger is quoted in Deborah L. Rhode, *Access to Justice* (New York: Oxford University Press, 2004), p. 96.

56 Abel, *American Lawyers*, p. 136. More generally, see Lillian Deitch and David Weinstein, *Prepaid Legal Services* (Lexington, MA: Lexington Books, 1976).

57 Pertinent cases include *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers, District 12 v. Illinois State Bar Association*, 389 U.S. 217 (1967); and *United Transportation v. State Bar of Michigan*, 401 U.S. 576 (1971).

58 American Bar Association Standing Committee on Pro Bono & Public Service, at www.americanbar.org/content/dam/aba/administrative/probono-public-service/ls_supporting_justice_iv_final.authcheck.dam.pdf.

59 Abel, *American Lawyers*, p. 130.

60 Douglas E. Rosenthal, *Lawyer and Client: Who's in Charge?* (New York: Russell Sage, 1974), chaps. 1 and 6.

61 Susan M. Olson, *Clients and Lawyers* (Westport, CT: Greenwood Press, 1984), pp. 28–29.

62 These examples were suggested in ibid., pp. 29–30.

63 Luban, *Lawyers and Justice*, p. 303.

64 On the different orientations of LSC lawyers, see Kessler, *Legal Services for the Poor*.

65 For a defense of political litigation by LSC lawyers, see Luban, *Lawyers and Justice*, chaps. 14–16.

PART II

Judicial Process and Judicial Decision Making

5 Trials and Appeals 127
6 Criminal Justice and the Courts 165
7 Civil Justice and the Courts 213
8 Judicial Decision Making 241

Taylor & Francis
Taylor & Francis Group
http://taylorandfrancis.com

5

Trials and Appeals

Every decade has its "trial of the century," a dramatic courtroom conflict with lurid crimes and celebrities as defendants or victims. These trials have been described as "the perfect combination of Super Bowl, presidential election campaign, and prime-time police procedural."[1] This is the story of one such trial.

In March 1982, 15 months after Sunny von Bülow had lapsed into an irreversible coma, 12 jurors in a Rhode Island Superior Court found her husband, Claus von Bülow, guilty of attempted murder.[2] The sensational nine-week trial attracted reporters from all over the country, from the *New York Times* to the *National Enquirer*. And why not? The case had all the elements of a good story. The victim, who had been found lying unconscious in the marble bathroom of her Newport mansion, was an heiress; and, according to her will, her aristocratic Danish husband stood to inherit an estate worth millions. But her children from a previous marriage, who also had an interest in the estate, launched an investigation into the case, convinced that their stepfather was guilty. In the words of the prosecutor: "This case has everything. It has money, sex, drugs; it has Newport, New York, and Europe; it has nobility; it has maids, a butler, a gardener …. This case is where the little man has a chance to glimpse inside and see how the rich live."[3]

The prosecution's theory of the case was simple: Although Claus von Bülow did not love his wife, he did love her money and the lifestyle it afforded him. He also loved his mistress, soap opera star Alexandra Isles, who had threatened to leave him if he did not divorce Sunny. Rather than choose between money and mistress, Claus decided to have them both by murdering Sunny and making it appear that she had died of natural causes. To do this, the prosecution contended, he surreptitiously injected her with insulin, thereby inducing what he expected to be a fatal coma.

DOI: 10.4324/9781003440055-7

The prosecution introduced physical evidence to support its theory—most important, an insulin-encrusted needle allegedly found in a black bag belonging to Claus von Bülow. It also brought forward an expert witness who stated that Sunny's coma had been induced by an insulin injection. Sunny's maid testified that Claus owned the black bag and that she had seen needles and insulin in it in the past. Finally, Alexandra Isles admitted that she had threatened to leave Claus unless he got a divorce.

The defense attorneys decided against having Claus von Bülow take the stand in his own defense. Instead, they relied on the testimony of Joy O'Neill, a self-described confidante of Sunny's, who claimed that Sunny gave herself insulin shots. However, on cross-examination, the prosecution undermined O'Neill's credibility and with it the defense case. After six days of deliberations, the jury returned a guilty verdict.

After sentencing von Bülow to 30 years in prison, the trial judge commented, "The Trial of Claus von Bülow is over. The Trial of the Trial Judge is about to begin."[4] And so it was. Proclaiming his innocence, Claus von Bülow appealed his conviction to the Rhode Island Supreme Court. Newly hired to represent him on appeal was Alan Dershowitz, a Harvard professor and celebrated defense attorney. Although appellate courts focus on legal rather than factual questions, Dershowitz was convinced that the Rhode Island court would not overturn von Bülow's conviction unless the justices had some indication his client was innocent. He therefore framed his argument about errors in the trial proceedings in such a way as to raise doubts about von Bülow's guilt. Whether or not this approach was necessary, it succeeded: the Rhode Island Supreme Court reversed the trial court's decision. Citing the prosecution's failure to make certain potentially relevant documents available to the defense, and the police's seizure and testing of pills without a warrant, the justices awarded Claus von Bülow a new trial.

The state of Rhode Island again prosecuted von Bülow for attempted murder, but a different defense strategy led to a different result in the second trial. The documents withheld at the first trial revealed that, when questioned early in the investigation, the maid had never mentioned having seen insulin and a syringe in von Bülow's bag. Under intense defense questioning, she retracted her testimony from the first trial about the insulin. The defense also brought forward expert witnesses who countered the prosecution's claim that Sunny's coma had resulted from an insulin injection. In June 1985, the jury found Claus von Bülow not guilty of all charges.

Although this spectacular case is hardly typical of criminal cases, or even of criminal trials, it illustrates several aspects of the roles and operations of trial and appellate courts.

1. *Different courts, different functions.* Dershowitz's decision to emphasize doubts about von Bülow's guilt in the appeal was a bold but risky maneuver. It is the job of trial courts, not appellate courts, to establish the facts and determine whether a defendant is guilty or not, liable or not. The job of appellate courts is to review whether trial courts have observed proper legal procedures in trying and deciding to establish the facts and to determine guilt or liability. If the appellate court finds, as it did in the von Bülow case, that procedural irregularities prevented a fair trial, then it can remand the case for new proceedings in which those irregularities are eliminated. This second trial will seek anew to establish the facts and to determine whether the defendant is guilty or not guilty, liable or not liable.
2. *Cases and trials.* Most criminal cases, unlike the von Bülow case, are resolved without a trial, usually by the defendant pleading guilty following plea negotiations between the defense attorney and the prosecutor. (Most civil cases are likewise settled before trial.) Yet trials have an importance that far exceeds their number. As the von Bülow case illustrates, the more serious the charge, the more likely a criminal case is to go to trial. Defendants charged with serious offenses may be willing to take their chances with a jury, because they fear the punishment that a guilty plea would bring; and prosecutors may refuse to plea bargain, because public opinion supports severe punishment for those who commit serious crimes. In addition, both criminal and civil trials affect cases resolved without trial. Trials provide a baseline, a point of reference for resolving cases without trial. In plea bargaining, the negotiations of prosecutor and defense attorney are influenced by the punishment an offender would likely receive if the case were to go to trial. In civil cases, the willingness of the plaintiff and the defendant to settle depends on their perception of how they would fare if the case went to trial. Thus, even when cases are settled without trial, the negotiations take place in the shadow of the law.
3. *Lawyers' tactics.* Under the American adversarial system of justice, trial courts rely on the parties in the case to uncover relevant physical evidence—anything from documents and reports to, as in the von Bülow case, a syringe and insulin—and to bring forward witnesses to testify about what happened. As the von Bülow trials reveal, this reliance allows the attorneys for each side to structure the presentation of evidence to advance their clients' interests. They can enlist expert witnesses to support their clients' version of the facts, as in the second von Bülow trial, when the defense called its own experts to counter the medical testimony of the prosecutor's experts. Attorneys can also cross-examine the witnesses called by the other side. At trial, attorneys present evidence and argue about its significance. During

the first von Bülow trial, the prosecutor undermined the defense case by destroying the credibility of its main witness on cross-examination. During the second trial, questioning by defense attorneys during cross-examination caused the maid to change her story. Finally, defense attorneys in criminal cases can determine whether to call their clients to testify.

AN OVERVIEW OF THE CHAPTER

This chapter analyzes trials and appeals in the United States. The examination of trials highlights how the trial is structured to ensure accurate fact finding while safeguarding the rights of the parties at trial. It also describes the tactics attorneys use to advance their clients' interests during the course of a trial. In doing so, it reveals the tension between the legal system's concern for impartial decision making and the quest for advantage implicit in the adversary system.

This tension reappears in the discussion of the American jury. Because jurors control the fate of their clients, attorneys will use every device to persuade them, regardless of the evidence. This chapter investigates the extent to which juries consider factors other than the law and the evidence presented at trial in reaching their verdicts. It also considers whether changes in the structure and operation of the jury, such as reducing the size of the jury and partially eliminating the requirement of unanimous verdicts, affect jury deliberations and verdicts. Finally, the discussion turns to a question raised by the reliance on juries: Is justice served by tempering the rule of law with community views of justice?

The last topic of this chapter is the operation of appellate courts. The operations of the U.S. Supreme Court, the most visible and most important of the nation's appellate courts, will offer an initial example of how appellate courts review trial court rulings. Consideration is then given to how the decision-making process in other appellate courts both resembles and diverges from that in the Supreme Court. This inquiry will provide insight into the various ways in which judicial systems can be organized to promote justice.

TRIALS

Disputes and Fact Finding

A trial is a proceeding for resolving a dispute on the basis of law. More precisely, a trial serves to ascertain the facts about a situation, apply the law to that set of facts, and thereby determine whether a defendant is guilty or not guilty (in a criminal case) or liable or not liable (in a civil case). A trial may seek to resolve disputes about the facts in a case, the applicable law and how it applies, or questions of both fact and law.

Disputes About the Facts In some cases, the disputing parties agree about the interpretation and application of the law but offer differing versions of the facts. A criminal assault case, for example, may turn entirely on the identity of the assailant, or a robbery case on the defendant's claim that the victim actually owed him the money he took. Similarly, civil suits may focus on such questions as whether it was the defendant company's drug that produced the plaintiff's medical problems, or whether an employee was refused a promotion because of her race or gender.

Disputes About the Law In some cases, both parties agree on the relevant facts but disagree on the application of the law to those facts. In a criminal case, for example, the prosecution and defense may agree that a police search uncovered evidence of wrongdoing but disagree about whether the search was legal. In civil cases, too, the facts may be undisputed but not the legal standards. For example, is a person legally liable for injuries he inadvertently caused? Did an administrative agency have the legal authority to issue the regulations it did?

Mixed Disputes Involving Both Facts and Law

In some cases, questions of fact and law are intertwined. For example, when a defendant claims to have shot someone in self-defense, the outcome of the case depends on the facts surrounding the shooting and on the legal definition of "self-defense." Similarly, when a plaintiff sues for sexual harassment, the judge or jury must decide what the defendant did and whether those actions meet the legal definition of sexual harassment.

Although trial courts decide questions of both fact and law, their primary task is to gather the evidence necessary to resolve disputes. Indeed, their success in fact finding is crucial to the administration of justice. If a trial court misinterprets or misapplies the law, its error can be corrected on appeal. But if a trial court does not uncover all the relevant facts, there is no mechanism for introducing new testimony on appeal. Moreover, because they did not hear the witnesses, appellate courts are usually reluctant to reverse a trial court ruling, even if they suspect the trial judge may have misinterpreted the facts of the case.

Thus, if justice is to prevail, trial courts must uncover all evidence pertinent to the cases they are deciding and correctly evaluate that evidence. To ensure that all pertinent evidence is introduced at trial, the American legal system relies on the adversary system, which assumes that each side will bring forward all the evidence and legal arguments that support its position. The adversary system also serves to ensure the reliability of the evidence that is introduced by permitting each side to challenge the testimony of opposing witnesses during cross-examination. Further safeguarding the reliability of testimony and physical evidence at trial is the law of evidence, which prescribes what evidence can be admitted, who can present this evidence, and how it should be introduced.

The Diversity of Trials

Most people form their picture of trials from highly publicized cases or from courtroom dramas depicted on television or in books. Such trials, however, are exceptional. Most trials do not involve months of testimony, nor do they feature dramatic revelations from the witness stand or a barrage of motions and objections by the attorneys. Rather, they are brief and, at times, perfunctory affairs.

A study of criminal trials during the late nineteenth century found that most defendants were tried "in slapdash and routine ways, in trials that lasted a few hours or a few minutes at best."[5] Because criminal defendants today are guaranteed legal representation at trial, they are better able to mount a defense than were their counterparts a century ago. Still, unless the charges against a defendant are very serious, or the defendant demands a jury trial, most contemporary criminal trials do not last long either. In Philadelphia, for example, felony trials conducted without a jury averaged less than an hour.[6] Most trials in civil cases are also short, particularly when the amount at stake is small. In the Los Angeles Small Claims Court, for example, the average trial in contested cases lasted only 8.9 minutes, with the shortest trial taking only one minute.[7] But not all trials are abbreviated affairs in which procedural safeguards, such as trial by jury, are waived and various stages of the process compressed or eliminated. Let us look more closely at the legal safeguards available to defendants and at the various stages of a "full-dress" trial.

Rights at Trial

The Fifth and Fourteenth Amendments to the U.S. Constitution guarantee that neither the federal government nor the state governments may deprive any person of life, liberty, or property without due process of law. Nevertheless, exactly what process is "due" at trial, and what procedures are constitutional, is difficult to determine. Justice Felix Frankfurter described the problem:

> "Due Process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and

> circumstances. Expressing as it does in its ultimate analysis respect enforced by law for the feeling of just treatment … [and] representing a profound attitude of fairness between man and man, and more particularly between the individual and government, due process is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith that we profess.[8]

To give substance to this general guarantee of procedural fairness, judges have looked to the rights established by the federal and state constitutions, statutes, and judicial precedents, and the common law. Among these rights are:

Trial by Jury Trial by jury allows ordinary citizens to participate in the administration of justice and thus acts as a barrier against governmental tyranny. As Justice Byron White noted in *Duncan v. Louisiana*, "Providing an accused with the right to be tried by a jury of his peers gives him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[9] The Sixth Amendment to the U.S. Constitutions secures the right to trial by jury in federal criminal cases, and the Seventh Amendment secures that right in civil cases when more than $20 is at stake. In 1968, the Supreme Court ruled that defendants in state court also have a federal constitutional right to a jury trial in most criminal cases. State constitutions and state statutes also guarantee a right to trial by jury.

Right to Speedy and Public Trial The Sixth Amendment to the U.S. Constitution, along with analogous state provisions, secures for defendants in criminal cases the right to a speedy and public trial. The Constitution prohibits secret trials on the assumption that public scrutiny of the administration of justice protects against governmental abuse of its prosecutorial power and promotes judicial impartiality. State and federal guarantees of a speedy trial ensure that the government cannot charge people with crimes and then, by delaying their trials, keep them in jail or prevent them from proving their innocence. The Speedy Trial Act of 1974 requires that defendants in federal court be brought to trial no more than 100 days after they are charged with a crime.

Counsel The Sixth Amendment right to counsel was originally understood to ensure only that those accused of a crime could employ and bring to trial an attorney of their own choosing. But over time it became clear that, in the words of Justice Hugo Black, "any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[10] In the nineteenth century, several states began to furnish counsel to indigent defendants. In *Johnson v. Zerbst* (1938), the U.S. Supreme Court followed their lead, ruling that the right to counsel included appointment of counsel for indigent defendants in all criminal proceedings in federal courts. In *Gideon v. Wainwright* (1963), the Court further extended this protection to indigent defendants in state courts, and later cases extended the right to line-ups, preliminary hearings, and plea negotiations.[11] But the federal Constitution does not oblige either federal or state governments to provide attorneys to indigent plaintiffs in civil cases.

Securing and Confronting Witnesses The adversary system of justice works on the principle that truth will emerge from the clash of partisan presentations by the parties in a case. Each party is expected to bring forth all the evidence and arguments that support its position. The prosecution can secure the evidence it needs through its power to subpoena witnesses—that is, to require them to appear under the threat of legal punishment. To equalize matters, the Sixth Amendment gives defendants in criminal cases this same power to compel witnesses to appear. The adversary system also assumes that each party will seek to discredit the evidence and arguments of the opposing party, and so the Sixth Amendment guarantees defendants the right to confront and question witnesses against them. However, the Supreme Court has narrowed the right to confront witnesses, permitting children to testify about sexual abuse they suffered without having the defendant physically present before them.

The Burden of Proof In both criminal and civil cases, the burden of proof rests on the party who initiates the proceeding. However, the standard of proof depends on the type of case. For a conviction in a criminal case, the prosecution must prove guilt "beyond a reasonable doubt." Thus, defendants in criminal cases need not prove their innocence; they must merely raise doubts about their guilt. This high threshold of persuasion reflects the belief that it is better to risk letting the guilty go free than to risk convicting the innocent. In civil cases, a lower standard of proof—proof by a preponderance of the evidence—suffices. This standard is satisfied when the balance of probabilities favors the plaintiff or defendant in the case.

In a criminal trial, the prosecution must meet its burden of proof at trial without relying on the assistance of the defendant. Thus, the Fifth Amendment, along with analogous state guarantees, forbids compelling witnesses to testify against themselves. Indeed, the prosecution cannot even comment on the defendant's failure to testify, and jurors are cautioned not to draw any inferences from the defendant's refusal to take the stand.

The Trial Process

Although procedures vary somewhat from state to state, a full-scale trial tends to follow certain set stages (see Box 5.1). These stages are basically the same in both civil and criminal litigation, although in civil cases the initiating party is referred to as the "plaintiff" rather than the "prosecutor."

Bench or Jury Trial? The initial step is the decision whether to choose a jury trial, in which a group of ordinary citizens renders the verdict, or a bench trial, in which a judge conducts the trial without a jury and then renders the verdict. In criminal cases in which jury trial is an option, the choice is left to the defendant. In civil cases for which jury trial is available, the plaintiff and the defendant usually must agree to waive a jury trial.

More jury trials are conducted in the United States than in any other country, although the number of jury trials has declined in recent decades. According to an American Bar Association study, the percentage of federal lawsuits decided by jury trial dropped from 5.5 percent in 1962 to 0.8 percent in 2013, and the percentage of federal criminal cases decided by jury trial dropped from 8.2 percent in 1962 to 3.6 percent by 2013. Still, not all defendants are entitled to a trial by jury. For example, there is no federal constitutional right to a jury trial in criminal cases involving petty offenses, although state law may provide for one. Nor are jury trials

Box 5.1 The Stages of a Trial

1. Choice of a jury trial or bench trial
2. Jury selection (if a jury trial)
3. Opening statement of the prosecutor (or plaintiff's attorney)
4. Opening statement of the defendant's attorney
5. Presentation of the prosecution's (or plaintiff's attorney's) case
6. Presentation of the defendant's case
7. Rebuttal witnesses
8. Closing argument for the prosecution (or plaintiff)
9. Closing argument for the defendant
10. Closing argument in response for the prosecution (or plaintiff)
11. Judge's instructions to the jury (if a jury trial)
12. Deliberations by the judge (bench trial) or the jury
13. Announcement of the verdict

available in all civil cases. Most states, for example, mandate bench trials for family matters such as divorce or child custody disputes.

Litigants choose between a jury trial and a bench trial on the assumption that who decides the case will affect its outcome. Thus, those who are accused of particularly heinous crimes may waive their right to a jury trial, assuming that a judge will be less influenced by emotional factors than will a jury. Conversely, if defendants believe the community would be reluctant to apply the law to them, as in the case of a "mercy killing," then they may well opt for a jury trial. Finally, individuals suing corporations or other large organizations may insist on a jury trial, hoping that jurors will identify with them and sympathize with their plight.

Jury Selection If a jury trial is chosen, the next step is jury selection. Long before the trial, the jurisdiction will have compiled a master jury list, also called a wheel, that is designed to include all potential jurors within its borders. Many jurisdictions create their master jury list from voter rolls, sometimes supplemented by the local census, lists of taxpayers, or driver's license records.

From the master jury list, enough names are randomly selected to make up a *venire*, or jury pool. Those selected receive questionnaires designed to determine their eligibility for jury service. Some are disqualified by statute from serving on juries because they are aliens, do not meet local residency requirements, cannot read or speak English, or have been convicted of a felony. Others enjoy statutory exemptions for various reasons: their occupations are considered vital (elected officials, physicians, and members of the military); they might exert too much influence on jury deliberations (lawyers and police officers); or they might have an occupational prejudice as to guilt or innocence (police officers and clergy). Finally, some potential jurors are excused because jury service would impose an undue hardship on them. Some states excuse all persons who request to be excused, believing their reluctance to serve would probably make them poor jurors. Citizens who are not excused receive a summons to appear at the courthouse on a specified day. The court clerk's office then randomly selects groups of prospective jurors from the *venire* and directs them to courtrooms where they might be needed.

Jurors and alternates are selected for trial through a process called the *voir dire*, a French term usually translated as "to speak the truth." During *voir dire*, prospective jurors are questioned to determine whether they can decide the case fairly and impartially. Based on their answers, the prosecution or the defense can challenge prospective jurors "for cause," claiming that they are biased about the defendant, the prosecution, or the case. Among the factors that might justify a challenge for cause are personal relationships between the juror and a litigant, preconceptions about the case or the parties to it, or, if applicable to the case, prejudice against a racial, ethnic, or religious group. If the judge rules that cause has been shown, then a challenged juror is excused. There is no limit on the number of jurors who can be challenged for cause, and in highly publicized cases the process of jury selection can be quite drawn out. In the "Hillside Strangler" murder trial in Los Angeles, for example, *voir dire* and jury selection took 49 court days.[12]

Attorneys may also remove a limited number of prospective jurors through peremptory challenges. In exercising peremptory challenges, attorneys need not specify their reasons nor gain the judge's approval for removing a juror. Thus, peremptory challenges enable each side to eliminate prospective jurors whom they suspect of being predisposed against their client, even if the jurors have not displayed any overt prejudice that would justify a challenge for cause. Even more important, lawyers also attempt to use peremptory challenges to eliminate prospective jurors who they believe will be unsympathetic and to empanel a jury favorable to their client (see Box 5.2). There are, however, legal limitations on the use of peremptory challenges. The U.S. Supreme Court has ruled that the Constitution prohibits their use to exclude prospective jurors exclusively on the basis of race or gender.[13] The number of peremptory challenges exercised is established by statute and varies by jurisdiction and the seriousness of the charges. Arkansas, for example, permits the prosecution 10 peremptory challenges and the defense 12 in capital cases, but only six and eight in other felony cases, and three apiece in misdemeanor cases.

The mechanics of the *voir dire* also vary by jurisdiction. In some states, the judge alone questions prospective jurors; in others, attorneys may pose supplemental questions; and in still others, the attorneys conduct all questioning of prospective jurors. In major cases, the scope of questioning during *voir dire* can be quite extraordinary. In the O. J. Simpson murder trial, for example, prospective jurors were asked to complete an 80-page questionnaire that included 294 questions, ranging from "Have you ever dated a person of a different race?" to "Have you ever asked a celebrity for an autograph?"[14] Because the jury's composition may be crucial to their success at trial, most trial lawyers want to conduct *voir dire* questioning. Doing so enables them to probe for the information they need to exercise their challenges wisely. Equally important, conducting *voir dire* gives them an opportunity to try to influence the jury and lay the foundation for the case they plan to present. As one commentator described it, "you are building an audience for your case and understanding how to shape your evidence to meet their expectations."[15]

How do attorneys choose jurors? In most cases, given the unavailability of information on juror attitudes, attorneys rely on broad

Box 5.2 Jury Selection in the O. J. Simpson Murder Trial

From the outset, the prosecution and the defense in O. J. Simpson's murder trial knew that jury selection would be crucial to the outcome. The defense team retained Jo-Ellan Dimitrius, a crack jury consultant with a record of success with Los Angeles juries. Donald Vinson, president of Decision Quest, one of the nation's top jury consultants, offered his services for free to the prosecution.

Dimitrius and Vinson both polled residents of Los Angeles to determine their attitudes on the Simpson case, as well as on various issues that might arise at trial. In addition to polling, the defense conducted focus groups, whose discussions helped the attorneys devise the questionnaire to be submitted to prospective jurors during *voir dire*. The prosecution, meanwhile, staged "mock trials"—presentations of opening arguments before demographically diverse groups—and observed the groups' subsequent deliberations through one-way glass.

With this information, Dimitrius and Vinson each constructed profiles of the ideal defense juror. Their profiles largely coincided: a blue-collar, middle-aged, African American woman who had some personal or familial experience with law enforcement. Simpson's attorneys heeded Dimitrius's advice and sought to select jurors who fit this profile. But prosecutor Marcia Clark rejected Vinson's advice, confident that the spousal-abuse issue in the case and her experience in establishing rapport with African American women jurors would be decisive. The prosecution thus failed to use its full allotment of 20 peremptory challenges, and the jury that finally acquitted Simpson included eight African American women, one African American man, two white women, and one Hispanic man. To prevent them from being influenced by media coverage of the trial, the jurors were sequestered for 265 days.

SOURCES: Jeffrey Toobin, *The Run of His Life: The People vs. O. J. Simpson* (New York: Random House, 1996); Johnnie L. Cochran, *Journey to Justice* (New York: Ballantine Books, 1996); and Marcia Clark, *Without a Doubt* (New York: Penguin, 1997).

generalizations and gut feelings. Thus, fabled defense attorney Clarence Darrow acknowledged that he based his choices largely on stereotypes, choosing as candidates for peremptory challenges the "cold as the grave" Presbyterians, the "almost sure to convict" Scandinavians, and, above all, the very rich, for whom "next to the Board of Trade, the Penitentiary is the most important of all public buildings." For modern defense attorneys, the stereotypes may have changed, but not the approach. Famous defense attorney Gerry Spence says he prefers male jurors, because he believes men have done more hell-raising and are more forgiving of it, and fat people rather than thin people, because fat people lack self-control and therefore would not demand as much from others.[16]

In recent decades, attorneys in some major cases have sought to replace guesswork with science by enlisting social scientists to assist in jury selection. The first use of scientific jury selection, during the 1972 conspiracy trial of Daniel Berrigan and other anti-Vietnam War activists, exemplifies the basic approach. Sociologists and social psychologists sympathetic to the defendants conducted a telephone survey of the area in which the trial was to take place, asking questions about the issues in the coming trial and obtaining demographic information from respondents. From this they developed demographic profiles of the kinds of people likely to be hostile or sympathetic to the defendants. Defense attorneys carefully questioned prospective jurors with unfavorable demographic profiles and used their peremptory challenges to eliminate those who had not been excused for cause. Whatever the success of this selection process, Berrigan and his fellow defendants were acquitted of all charges.

Today, attorneys in major trials often hire jury consultants to assist them. These consultants convene focus groups and conduct community attitude surveys to assess public opinion and help in deciding what sorts of persons they want on a jury. Attorneys may try out arguments in front of "mock juries" before trial and employ "shadow juries," people similar to those serving on the jury, who are hired to provide daily feedback on how the arguments presented in court might have been received by the jury. Whether these approaches can predict juror behavior is hotly disputed. One overview of pertinent studies concluded that when different people were presented with the same evidence and the variations in their verdicts were examined, only 5–15 percent of the variations were connected to demographic and personality factors.[17] Yet insofar as jury consultants do advantage those who consult them, this raises serious questions: Does scientific jury selection increase the likelihood that trial outcomes will be determined by the predispositions of jurors rather than by evidence? Should jury selection techniques be permitted if they give an advantage only to those who can afford to use them?

Opening Statements Before evidence is presented, the attorney for the party that initiated the litigation—the prosecution in criminal cases or the plaintiff in civil cases—presents an opening statement. This statement previews the prosecution's case, identifying the issues and describing the evidence that the prosecutor intends to offer. This narrative thus serves as a road map for jurors throughout the trial. The defense usually follows with its own opening statement, raising questions about the prosecution's evidence and promising contradictory evidence. On occasion, a defense attorney may postpone giving an opening statement until after the presentation of the prosecution's case.

By law, opening statements are supposed to be bare outlines of the substance of the evidence, free of argument or appeals to emotion.

Many trial lawyers, however, believe that opening statements can make or break a case. These statements, they note, provide attorneys their first opportunity to establish a rapport with the jury, and the impression attorneys make with their opening statements may predispose jurors toward the prosecution's or the defense's position, even before testimony is presented.[18] Thus, attorneys view the opening statement as an opportunity to persuade. The challenge, given the strictures on persuasive appeals, is to "prepare a persuasive opening statement that appears to be devoid of persuasive appeal."[19]

Presentation of the Prosecution's (Plaintiff's) Case Each party in a trial offers its evidence in turn, with the party who initiated the litigation—and who therefore must prove its case—presenting witnesses and physical evidence first. The questioning of each witness may involve three stages: direct examination, cross-examination, and redirect examination. During direct examination, the prosecutor elicits testimony about the facts needed to prove the prosecution's case. The defense attorney may then cross-examine prosecution witnesses, attempting to discredit their testimony or undermine their credibility. Finally, the prosecutor may ask additional questions of a witness during redirect examination to undo damage resulting from an effective cross-examination.

Considerable planning goes into the presentation of the prosecution's case. First, prosecutors must identify the facts they need to prove to win the case, and, by interviewing prospective witnesses, determine who will testify to those facts. Prosecutors usually seek more than one witness for each important fact, because multiple witnesses can corroborate one another's testimony. Next, prosecutors prepare their witnesses to testify by going over what the witness will say. Although they cannot dictate the substance of witnesses' testimony, experienced prosecutors never ask a question on direct examination without knowing beforehand the answer they should receive. They may also coach the witnesses on how to present their stories effectively and on what questions to expect during cross-examination. Finally, prosecutors must determine in what order to present their witnesses to ensure a clear and persuasive case. One manual for trial lawyers describes a jury trial as "a drama, with the jury the audience, the judge the critic (who delivers his reviews during, not after, each scene), and the witnesses the actors. The trial lawyer is the director, producer, and narrator. To reach your audience, you must view each element of the trial for its potential impact on the jury."[20]

The prosecution, like the defense, is governed by rules of evidence that prescribe what evidence can be presented and how it can be presented. These rules serve to promote reliable fact-finding by admitting only evidence that is trustworthy and relevant. For example, the rules of evidence generally exclude hearsay—that is, testimony a witness provides based not on personal knowledge but on what another person has said—because there is no way to test its trustworthiness through cross-examination.

Many rules of evidence are not so clear, however, and the prosecution and defense may differ on whether some testimony or physical evidence is admissible. For example, courts usually exclude testimony about a victim's sexual history in rape trials, because it has no bearing on whether the crime was committed and may prejudice jurors' consideration of the case. When either side objects to the admission of a piece of evidence, the judge must apply the law of evidence in ruling on the objection. If the defense unsuccessfully objects to the admission of evidence that is then used to secure a conviction, it may appeal the judge's interpretation of the law of evidence. Similarly, the prosecution may appeal the exclusion of evidence it deems vital to its case.

Presentation of the Defendant's Case Once the prosecution has completed the presentation of its case, the defense may introduce its own evidence. In a criminal case, in which the prosecution must prove guilt beyond a reasonable doubt, the defense need not prove its own version of the facts or even present witnesses; it need merely create reasonable doubt about the prosecution's version. Skillful defense attorneys will already have begun to sow such doubts during their cross-examination of the prosecution's witnesses and may continue to do so by offering physical evidence, testimony of defense witnesses, or both.

The most difficult question defense attorneys face is whether the defendant should testify. On the one hand, jurors are naturally curious about the defendant's version of events, and a convincing assertion of innocence by the defendant may lead to acquittal. Moreover, despite warnings by the judge that no inferences should be drawn from a defendant's failure to testify, jurors may well expect a defendant to take the stand if he or she is innocent, so the failure to testify could hurt the defendant's chances. On the other hand, a defendant who testifies is subject to cross-examination by the prosecutor, who may expose difficulties with the defendant's story. In addition, the prosecutor can impeach the defendant's credibility by introducing, within certain limitations, evidence of his past criminal record. Thus, the defense attorney must judge, and advise the client on, whether jurors will view the defendant as a truthful witness with a believable story.

In civil cases, the plaintiff need merely prove its case by a preponderance of the evidence, so the defense must offer a version of the facts at least as convincing as the plaintiff's account. Therefore, although the process of offering testimony and other evidence is the same in civil cases as in criminal cases, the greater burden on the defense usually requires presentation of a more elaborate case for the defense.

After the defense presents its case, the prosecution may call rebuttal witnesses to attempt to discredit the testimony of defense witnesses or impeach their credibility. The testimony of rebuttal witnesses concludes the presentation of evidence at trial.

Closing Arguments Closing arguments provide attorneys their last chance to sway the jury. An effective closing argument "pulls together the disparate threads of evidence and weaves them into a coherent and compelling whole" that leads to a favorable verdict.[21] Although rhetorical flourishes and emotional appeals alone are unlikely to win a case, closing arguments offer a unique opportunity for eloquent advocacy, and effective attorneys can turn a closing argument into a rhetorical tour de force. But there are limits here as well, and the use of prejudicial material can result in a verdict being overturned on appeal.

In its closing argument, the prosecution explains the issues in the case, summarizes the facts as it understands them, and explains why the testimony it presented is more reliable than the conflicting testimony offered by the defense. If the jurors are persuaded by this interpretation of what transpired at the trial, then conviction becomes the obvious and inevitable verdict. In its closing argument, of course, the defense portrays the evidence quite differently, arguing either that the prosecution failed to meet its burden of proof, or that the defense's version of events is more persuasive. The party bearing the burden of proof, the prosecution in criminal cases, or the plaintiff in civil cases, is allowed to make the final argument to the jury.

Jury Instructions In a bench trial, the judge decides both questions of fact and questions of law. A jury trial, however, involves a division of labor, with the jury responsible for deciding questions of fact and the judge responsible for determining the law to be applied. Thus, after closing arguments, the judge instructs the jury about the law in the case to guide it in its deliberations. The judge's instructions are written explanations of the law, which the judge reads to the jury in open court. Often the instructions are technical and detailed, and some judges therefore allow the jurors to take a copy of the instructions with them to the jury room.

Instructions to the jury include explanations of general matters, such as the responsibilities of the jury, the evidence it may consider, and the burden of proof to be met in the case. In criminal cases, the instructions also include detailed explanations of the specific legal offenses a defendant is charged with and the legal defenses the defendant may have advanced as they apply to the facts of the case. Thus, in a homicide case, the instructions might clarify such matters as the distinction between first-degree and second-degree murder, the concept of premeditation, and the legal meaning of self-defense. Finally, the judge instructs the jury about the possible verdicts it might render.

Judges do not draw up these instructions all by themselves. Rather, they rely on attorneys for the parties to draw up the instructions that they wish the jury to receive. The attorneys themselves tend to rely on volumes containing "model jury instructions," which they then tailor to the facts of the case. From the alternative versions of instructions the attorneys submit on each legal issue in the case, the judge selects the instructions that seem most appropriate, modifying them if necessary. An attorney whose version is rejected may base an appeal on that rejection, arguing that the jury was misinformed about the law in the case.

After it hears the judge's instructions, the jury retires to discuss the case. Once it completes its deliberations, the jury communicates its decision to the judge, who announces the verdict. Because the jury is such an important part of the American legal system, it deserves detailed consideration.

THE JURY IN THE UNITED STATES

The Changing Jury

The American jury has its roots in the English jury, which originated before the Norman Conquest in 1066. Juries in England were initially composed of local residents who had personal knowledge of the dispute at trial. Only gradually did the notion develop that jurors should be disinterested citizens who decide cases solely on the basis of evidence presented at trial. It was also not uncommon in England for judges or political authorities to pressure a jury to reach the verdict they desired. A particularly egregious example occurred in 1670 in the trial of William Penn for unlawful assembly and breach of the peace. When the jurors found Penn not guilty of the charges, the judge refused to accept their verdict and sent them back to deliberate some more. After two-and-a-half days of deliberation without food, water, or chamber pot, the jury still would not convict Penn, so the angry judge fined each of the jurors and kept them in jail until they could pay their fines. This outrageous conduct produced a backlash and effectively ended the practice of coercing juries to reach "correct" verdicts.

A more recent change involves the scope of the jury's responsibilities. Today the judge determines the law and instructs the jury about it, and the jury determines the facts and applies the law to those facts. This division of labor did not develop in the United States until the nineteenth century. Before that, the jury determined both the facts and the law. Although the judge instructed jurors about the law, they remained free to ignore the judge's instructions and render verdicts based on their consciences or their own independent interpretation of the law. Such "jury nullification" undercut unpopular laws by allowing groups of ordinary citizens to decide which laws would be enforced. In the decade preceding independence, for example, juries in the American colonies effectively nullified seditious libel laws, which outlawed criticism of the English government, by consistently refusing to convict those charged with violating those laws.

Although the province of the jury diminished when judges were assigned the responsibility to determine the applicable law, the change did not altogether eliminate jury nullification. Community sentiment still may affect jury verdicts. During the 1920s, juries often refused to convict ordinary citizens who had run afoul of the Prohibition laws. And throughout the first half of the twentieth century, segregated juries in the South frequently acquitted whites accused of violence against blacks. Yet in refusing to convict those guilty of violating criminal law, contemporary jurors exceed their legal authority, and the recognition of their legal obligation to apply the law may lead jurors to do so even when they disagree with the law.

The greatest change in the American jury over the last century was the creation of more representative juries through inclusion of previously excluded groups, such as African Americans, Hispanic Americans, and women. Important changes have also occurred in the size and decision rules of juries, and it is to these we now turn.

Jury Size and Jury Decision Making

Early in the history of the Anglo-American jury, it was established that juries would include 12 members and reach their verdicts by unanimous vote. If the jurors could not agree on a verdict, the judge would rule that the jury was "hung" and dismiss it. If the jury was hung in a criminal trial, the accused, having been neither convicted nor acquitted, could be tried again for the same offense. Thus, after the jury hung in the first prosecution of Bill Cosby for sexual assault, he was tried again and in that second trial was convicted. Often, however, the prosecution declines to reinstitute charges after having failed to win a conviction in the first trial.

During the twentieth century, several states sought to reduce the costs of trials and promote efficiency by reducing the size of juries and experimenting with non-unanimous verdicts. When disappointed litigants challenged these experiments as unconstitutional, the Supreme Court for the most part backed the states. In *Williams v. Florida* (1970), the Court ruled that a jury of 12 was not required in state criminal or civil trials, although in 1978 it established a minimum size of six members in state criminal trials.[22] In 1972 in *Johnson v. Louisiana* and *Apodaca v. Oregon*, the Court also upheld the use of non-unanimous (9–3) verdicts in criminal cases, although it later held that a six-member jury could convict a defendant only by unanimous vote.[23] These rulings encouraged previously reluctant states to modify their jury systems. Currently, 22 states use juries of fewer than 12 to try civil cases, 24 states use them to try misdemeanors, but 43 states continue to employ 12-member juries in felony cases.

Critics of these changes argued that they affect jury deliberations and the outcome of cases. A six-member jury is likely to be less diverse and, therefore, less representative of the community than a 12-member jury. Furthermore, decreasing the size of the jury reduces the likelihood of hung juries, because a single juror is unlikely to hold out against group sentiment or to find allies on a six-member jury. Also, when non-unanimous verdicts are permitted, the majority on a jury need not persuade holdouts that the verdict is correct. This not only means that non-unanimous juries are less likely to hang but also that they are less likely to listen carefully to the holdouts' perspectives on the case. Finally, critics argued that non-unanimous juries convict defendants who are not guilty beyond a reasonable doubt, citing the reluctance of some jurors to convict as conclusive evidence that a reasonable doubt existed.

Empirical studies confirmed these criticisms. They showed that permitting non-unanimous verdicts reduced the frequency of hung juries in criminal cases and that 12-member juries and those deciding unanimously tended to deliberate longer before reaching their verdicts, which may suggest a more thorough consideration of the evidence. Finally, they discovered that the variety of viewpoints tended to increase on 12-member juries and that jurors holding minority viewpoints were more likely to participate actively in discussions and be listened to when verdicts had to be unanimous.[24]

In *Ramos v. Louisiana* (2020) the Supreme Court held that the right to trial by jury in criminal cases required conviction by a unanimous jury, overturning its 1972 ruling and ending the practice of allowing convictions by divided juries. However, in 2022 the justices declined to consider whether defendants facing serious criminal charges were legally entitled to 12-person juries, rejecting an appeal from an Arizona man who was convicted of fraud by an eight-member jury.[25]

Evaluating the Jury

As Box 5.3 indicates, there is considerable controversy about whether the jury serves the cause of justice. In England, the birthplace of the modern jury, jury trials have declined in criminal cases and have virtually disappeared in civil cases. In the United States, jury trials have likewise

Box 5.3 Evaluating the Jury

"We have a criminal jury system which is superior to any in the world; and its efficiency is only marred by the difficulty of finding twelve men every day who don't know anything and can't read."

Mark Twain

"Trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives."

Lord Justice Devlin, English judge

"While the jury can contribute nothing of value so far as the law is concerned, it has infinite capacity for mischief, for twelve men can easily misunderstand more law in a minute than the judge can explain in an hour."

Jerome Frank, legal scholar and judge

"Although jurors are extraordinarily right in their conclusion, it is usually based upon common sense "instincts" about right and wrong, and not on sophisticated evaluations of complicated testimony …. Because judges, sometimes, consciously reject this laymen's approach of who is right or wrong and restrict themselves to the precise legal weights, they come out wrong more often than the juries."

Louis Nizer, defense attorney

"I submit that the jury is the worst possible enemy of [the] ideal of the "supremacy of law." For "jury-made law" is, par excellence, capricious and arbitrary, yielding the maximum in the way of lack of uniformity and unknowability."

Jerome Frank

"The jury represents an impressive way of building discretion, equity, and flexibility into a legal system. Not the least of its advantages is that the jury, relieved of the burdens of creating precedent, can bend the law without breaking it."

Harry Kalven and Hans Zeisel, legal scholars

"Jurymen seldom convict a person they like, or acquit one that they dislike. The main work of a trial lawyer is to make a jury like his client, or, at least to feel sympathy for him; facts regarding the crime are relatively unimportant."

Clarence Darrow, defense attorney

"The jury contributes most powerfully to form the judgment, and to increase the natural intelligence of a people; and this is, in my opinion, its greatest advantage. It may be regarded as a gratuitous public school ever open, in which every juror learns to exercise his

> rights … I think that the practical intelligence and political good sense of the Americans are mainly attributable to the long use which they have made of the jury in civil causes."
>
> Alexis de Tocqueville, French commentator on America

SOURCES: Mark Twain, quoted in Randolph N. Jonakait, *The American Jury System* (New Haven, CT: Yale University Press, 2003), p. xx; Patrick Devlin, *Trial by Jury* (London: Stevens, 1956), p. 164; *Skidmore v. Baltimore & Ohio Railroad*, 167 F.2d 54 (2d Cir. 1948); Louis Nizer, *My Life in Court* (New York: Jove, 1978), p. 359; Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton, NJ: Princeton University Press, 1949), p. 132; Harry Kalven, Jr. and Hans Zeisel, *The American Jury* (Boston: Little, Brown, 1966), p. 498; Clarence Darrow, quoted in Valerie P. Hans and Neil Vidmar, *Judging the Jury* (New York: Plenum Press, 1986), p. 131; Alexis de Tocqueville, *Democracy in America*, ed. Richard D. Heffner (New York: New American Library, 1956), p. 128.

declined, particularly in civil cases, where fewer than one-third of trials are jury trials. Indeed in one civil case an appellate court ruled that the issues were so complex that a trial by jury would constitute a denial of due process.[26] Underlying this ruling is the belief that ordinary citizens lack the capacity to comprehend highly technical evidence and apply complicated legal standards so as to render decisions in accordance with law. Many opponents of the jury believe this criticism equally applicable to jury decision making in ordinary cases. According to these critics, bench trials are preferable because judges are better able to understand and evaluate evidence, more knowledgeable about the law, less affected by prejudice and emotion, and therefore more likely to render law-based decisions.

Do juries, in fact, misunderstand or ignore the law and reach legally indefensible decisions based on prejudice or emotion? The most thorough investigation of this question is *The American Jury*, a study that compared jury verdicts in more than 3500 criminal trials and in more than 4000 civil trials with the verdicts that trial judges would have rendered in bench decisions.[27] This study found that jury decision making was not arbitrary. In more than three-quarters of the criminal and civil trials, the jury and judge agreed on the verdict, suggesting that the jury reached the legally required result. Moreover, in most cases in which trial judges disagreed with jury verdicts, they viewed those disagreements as arising not from jury caprice or incompetence but primarily from different evaluations of the evidence or the defendant. In only 9 percent of the cases did trial judges maintain that the jury's verdict was without legal merit. Subsequent studies have corroborated the conclusion of *The American Jury* that jurors generally follow the law and evidence presented to them in reaching their verdicts.

But if the decisions of judges and juries generally coincide, does it not make sense to dispense with jury trials, which may be costly and time consuming, and allow judges to decide all cases? According to advocates of jury trials, the costs of eliminating trial by jury far outweigh the benefits. As Alexander Hamilton observed in *Federalist Paper No. 83*, "The strongest argument in [the jury's] favor is that it is a security against corruption." Others have insisted that the jury is valuable because it provides one of the few opportunities Americans have to participate in government. In addition, analysis of those instances in which the judge and jury disagree suggests that the jury brings a distinctive perspective to the administration of justice. According to *The American Jury*, in civil cases juries do not consistently favor either the plaintiff or the defendant. However, in criminal cases, juries are more likely to rule in favor of defendants, acquitting them or hanging when the judge would have convicted or convicting the defendant of a lesser charge. This greater lenience in some instances reflects a willingness to give the benefit of the doubt to defendants without a criminal record, but in others it reflects a rigorous interpretation of the "beyond a reasonable doubt" standard. Jury nullification also plays a role. Jurors sometimes refuse to convict when they disagree with the law or when they believe that defendants have already suffered enough for their wrongdoing.[28]

According to advocates of jury trials, these findings demonstrate the value of the jury as a mechanism for bringing community sentiment to bear and correcting the harshness of the law when it would lead to unjust results. Put differently, the value of the jury lies in its political role. To its critics, however, these findings confirm that the jury system is at odds with the rule of law and substitutes community prejudices for the even-handed administration of justice. Thus, one's verdict on the jury largely depends on whether one views the infusion of community values into the administration of justice as a positive or a negative phenomenon.

APPEALS

The Appellate Process

In the United States, after trial courts render their decisions, dissatisfied litigants are entitled to an appeal, but fewer than 13 percent of state and federal trial court decisions are appealed. The appellate court's main job is error correction—that is, ensuring that the law was correctly interpreted and applied at trial. After a first-level appellate court—such as a federal court of appeals or a state intermediate court of appeals—rules on their cases, litigants may appeal those decisions as well. However, the second-level appellate court typically has some discretion over whether it will hear the case. For cases that fall within the jurisdiction of the federal courts, the final resort for litigants is the U.S. Supreme Court. For cases that do not, the final appeal is to the state's supreme court.

Appellate courts differ among themselves in terms of:

1. *Agenda setting.* To what extent do legal guidelines determine what cases a court must decide, and to what extent does the court exercise discretion in deciding what cases to hear?
2. *Information gathering.* How does the court secure the information it needs about the facts of the case, the applicable law, and the likely consequences of its decisions?
3. *Decision making.* What is the process by which the members of the court resolve their differences and reach decisions?
4. *Promulgating decisions.* How does the court convey its decisions to litigants and the general public?

Rather than considering in detail how all appellate courts deal with these matters, let us focus on the operations of the U.S. Supreme Court and then compare that court with other appellate courts in the United States.

THE U.S. SUPREME COURT

Agenda Setting

The Cases Each year the Supreme Court receives more than 5000 petitions for review, the vast majority appealing rulings of federal courts of appeals or state supreme courts. Litigants who cannot afford the costs of an appeal (like Clarence Gideon, whose case is discussed in Chapter 2) can file their petitions *in forma pauperis*, "in the manner of a pauper," and the Court will waive fees and other costs. In recent years, the Court has accepted fewer than 80 cases annually—about 1 percent of the cases it receives on appeal—for full briefing, oral argument, and decision, with the decision announced in a written judicial opinion that explains its reasoning. In addition, the justices address some procedural matters without legal briefs or formal opinions through what has been dubbed its "shadow docket," a practice that has become increasingly controversial in recent years (see Box 5.4). Over the course of the twentieth century, Congress gradually expanded the justices' control over court agendas. Today, the justices exercise virtually total discretion in deciding which appeals to hear and which to reject.

Of course, like other courts, the Supreme Court operates within legal constraints. It can rule only on cases that fall within its jurisdiction. In addition, the justices cannot address an issue unless a litigant brings it before them. Thus, the pool of cases from which the justices select is outside their direct control. Despite these constraints, the Court does tend to address most of the important political issues of the day. As Alexis de Tocqueville observed more than 170 years ago, "There is

Box 5.4 The Shadow Docket

The shadow docket refers to orders and summary decisions that the Supreme Court issues without the procedures normally associated with its merits docket, that is, without legal briefs or oral argument and, typically, without written opinions explaining the basis for its rulings. Shadow docket rulings are issued on an expedited basis, typically a week or less after an application is filed.

Many issues on the shadow docket, such as due dates for legal briefs, are procedural, of interest only to the litigating parties. But others, especially those involving "emergency motions," in which litigants petition the Court to suspend or reverse lower court orders while a case is still in progress, have had important ramifications. For example, in 2022 the Court by a 6–3 vote used the shadow docket to strike down a federal vaccine mandate imposed on most of the nation's work force. That same year, by a 5–4 vote, it placed a hold on a lower court's order invalidating Alabama's redistricting plan as a racial gerrymander, in effect allowing the state to conduct its 2022 elections using that plan. And two years earlier, likewise by a 5–4 vote, the justices struck down New York's capacity restrictions on religious services due to COVID-19.

The Supreme Court is supposed to grant requests to suspend or reverse lower court orders only rarely, in situations in which a lower court ruling could cause irreparable harm if allowed to stand. However, the Court in recent years has been more willing to grant such requests, prompting criticism by some justices and by legal commentators. Thus in dissenting from the Court's grant of an emergency motion in a recent case, Justice Elena Kagan complained that the Court had gone "astray," rendering "the Court's emergency docket not for emergencies at all" but rather just "another place for merits determinations—except made without full briefing and argument."

SOURCES: Harry Isaiah Black & Alicia Bannon, "The Supreme Court 'Shadow Docket'," at www.brennancenter.org/our-work/research-reports/supreme-court-shadow-docket; and *Symposium on the Supreme Court's Shadow Docket*, at www.scotusblog.com/category/special-features/symposium-on-the-supreme-courts-shadow-docket.

hardly a political question in the United States which does not sooner or later turn into a judicial one."[29] Over the last few years, for example, the Court confronted such contentious political issues as abortion, affirmative action, gun control, health care, and immigration. Indeed, groups may seek to shape the political agenda of their era by bringing their concerns before the Court. Examples include the NAACP's campaign against racial segregation from the 1930s to the 1950s, attempts by Legal Services lawyers to establish new rights for the poor in the late 1960s and the 1970s, and the ultimately successful efforts of right-to-life groups to overturn the Court's ruling in *Roe v. Wade* recognizing a constitutional right to terminate a pregnancy.

By their decisions, justices may also influence the pool of cases brought before them. An extreme example occurred in the Supreme

Court's flag-salute cases. In 1940, the Court had ruled that states could require public-school students to salute the American flag, notwithstanding their religious objections to the practice. Two years later, however, three members of the Court majority used the occasion of an unrelated case to admit that they had erred and to repudiate their votes. This admission, along with personnel changes on the Court, invited new litigation, and the Court overruled its earlier flag-salute decision only three years after it was rendered.[30]

Generally, the Court's influence on the types of cases appealed to it is less direct. If the justices indicate a willingness to entertain a type of claim, then litigants are encouraged to bring cases to the Court that raise such claims. During the 1960s, the Court's receptivity to the rights claims of criminal defendants prompted a proliferation of claims by those who sought to overturn their convictions. More recently, once the Court indicated it might reconsider its position on abortion, several cases were initiated to provide a vehicle for the Court to overrule *Roe v. Wade*. As Stephen Wasby put it, the justices cannot "place a particular fish in the stream," but they can "stimulate others to stock the stream."[31] Conversely, if the Court consistently rejects certain types of legal claims, litigants tend not to bring such claims before the Court. Thus, the Court's tendency to read defendants' rights narrowly since the 1980s likely discouraged some defendants from appealing their cases to the Court.

Finally, at times the Court purposely announces rulings that leave important questions unresolved. In such circumstances, the justices can expect litigants to raise those questions in the lower courts and to appeal adverse rulings to the Supreme Court. This allows the Court to address those questions at a later date, with their judgment illuminated by the opinions of lower court judges who have confronted those questions. A prime example involved police interrogations. In *Escobedo v. Illinois* (1964), the Court ruled that police could not deny an accused person access to his attorney during a police interrogation.[32] But the ruling in *Escobedo* did not indicate whether the accused had to request an attorney, whether the police could delay granting access to one, or whether they had to provide one for indigent persons. Over a period of 18 months, 150 cases raising *Escobedo*-type issues were appealed to the Court. In 1966, the Court resolved those issues with its decision in *Miranda v. Arizona*, which outlined the warnings that had to be given before police interrogations.[33]

The Process of Case Selection The process by which the justices select cases for review begins with the party appealing the lower court's decision petitioning the Court for a writ of certiorari—from the Latin, "made more certain"—asking that the Court hear the case. The justices, in conjunction with their law clerks (see Box 5.5), review the petitions and individually determine which cases they believe merit consideration. The chief justice prepares and circulates a "discuss list,"

Box 5.5 Law Clerks

Imagine being a recent law-school graduate and drafting judicial opinions for the U.S. Supreme Court. Farfetched as that may seem, drafting opinions would likely be one of your responsibilities if you were one of the elite group of young lawyers chosen annually to clerk for the justices of the Supreme Court. This does not mean, of course, that the clerks determine how the Court decides. As Chief Justice William Rehnquist noted, clerks are not "legal Rasputins," manipulating the justices to advance their own legal or policy goals. Nevertheless, working under the close supervision of the justice who selected them, law clerks play a crucial role in the operations of the Supreme Court.

In 1882 Justice Horace Gray became the first Supreme Court justice to hire a law clerk, paying the clerk out of his own pocket. Gray's successor on the Court, Oliver Wendell Holmes, continued the practice, and gradually other justices followed suit. Today, each justice chooses four clerks each year to assist with his or her work. The clerks are truly a select group. Typically, they include the top graduates of major law schools—over the last few decades, about 40 percent attended either Harvard or Yale Law School. The clerks usually come to the Court with the experience of a year's clerkship for a judge on a court of appeals. The justices are free, however, to employ their own criteria in selecting their clerks, and some have been partial to clerks from their own region or law school. For example, Justice William O. Douglas, a native of Washington, characteristically chose Westerners as his clerks. More recently, justices have tended to select clerks who share their political or jurisprudential orientation. In 1944, Justice Douglas hired the first female clerk, and in 1948 Justice Felix Frankfurter the first African American clerk.

Because the clerks are to assist the justices, each justice determines the tasks his clerks will perform. Justice Gray, for example, asked his clerk's advice in picking out a ring when he became engaged at age 60, and Justice Hugo Black required his clerks to play tennis with him. However, most clerks share certain common tasks. The clerks assist their justice in reviewing the petitions for certiorari, drafting memos that detail the issues and legal arguments in each case, and recommending whether certiorari should be granted. Justices usually go along with their clerks' recommendations, perhaps because the recommendations take into account the perspectives of the justice to whom they are addressed. Justice John Paul Stevens underscored the importance of the clerks' work in screening petitions for review, noting, "I don't even look at the papers in over 80 percent of the cases that are filed."

Clerks also assist in preparing opinions. They conduct legal research for their justices, and most prepare rough drafts of opinions along lines dictated by the justice. The justice will then revise the draft before circulating it to other members of the Court, whose comments may lead to further revisions. Clerks may serve as "sounding boards" for their justices, providing them with opportunities to discuss the issues in the cases they are deciding. Although justices could conceivably be swayed by the arguments of their clerks, this rarely happens. The justices have enough experience to work with a staff without being dominated by it. In addition, the clerks themselves are transients; with rare exceptions, they serve for only a single year.

SOURCES: David O'Brien, *Storm Center*, 10th ed. (New York: Norton, 2014); Todd C. Peppers, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerks* (Stanford, CA: Stanford University Press, 2006); and Peppers, Todd, and Artemus Ward, eds. *In Chambers: Stories of Supreme Court Clerks and Their Justices* (Charlottesville, VA: University of Virginia Press, 2012).

which includes the cases he believes warrant collective consideration, and other justices may add cases to the list. Unless a justice requests that a petition be discussed at conference, the petition is denied. More than 70 percent of all petitions for certiorari are thus disposed of before conference.

Collective consideration of the petitions on the discussion list begins at the three- to four-day conference held before the beginning of the Court's term in October. During this conference which, like all the Court's conferences, is attended only by the justices themselves, the justices may screen as many as 2000 petitions for certiorari that have accumulated over the preceding summer. At weekly Friday conferences held throughout the Court's term, the justices continue their screening. If four justices vote to hear a case—the so-called Rule of Four—it is accepted for review and scheduled for oral argument. If fewer than four justices favor review, the petition for certiorari is denied, and the decision of the lower court stands.

Criteria for Case Selection It is difficult to determine what factors influence the justices' decisions to grant or deny review, because the justices neither publish nor explain their votes. The Court's own Rule 10, "Considerations Governing Review on Certiorari," offers some guidance (see Box 5.6), but the justices can grant review when the listed factors are absent or deny review even when they are present. To some extent, the criteria used in voting on certiorari petitions may be idiosyncratic, varying from justice to justice and even from case to case. Nonetheless, some general observations are possible.

First, the Court accepts cases that involve political disputes of national import. Thus, during the Korean War, it ruled on the constitutionality of President Harry Truman's seizure and operation of the nation's steel mills; and during the Watergate scandal of the early 1970s, it reviewed a challenge to President Richard Nixon's claim that he could withhold incriminating tape recordings from a special prosecutor. More recently, the Court resolved a dispute over election returns in Florida that in effect determined the outcome of the 2000 presidential election, and it has heard several cases involving rights claims by suspected terrorists. Nevertheless, the Court tends to avoid becoming embroiled in political disputes that it feels it cannot resolve. For example, it refused to hear

Box 5.6 Rule 10: Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right but of judicial discretion, and it will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
    a When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter.
    b When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a federal court of appeals.
    c When a state court of last resort or a federal court of appeals has decided an important question of federal law which has not, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.
2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

several challenges to the constitutionality of the Vietnam War and, more recently, it rejected any role in dealing with partisan gerrymandering, declaring it a political question inappropriate for judicial resolution.[34] It may also postpone consideration of sensitive issues to avoid losing public support. Thus, after the Court had angered many white Southerners by invalidating state laws mandating racial segregation in public schools, it refused for more than a decade to consider challenges to state laws banning racial intermarriage.[35]

Some scholars have suggested that the Court's decisions on whether to grant certiorari can be predicted on the basis of certain "cues" that trigger review. Underlying this theory is the assumption that, when faced with a deluge of petitions for review, the justices and their clerks develop shortcuts to identify meritorious cases. In recent years, the most important cue seems to be whether the party seeking review is the federal government. Other relevant cues include conflict between a lower court decision and a Supreme Court precedent, conflict between circuits on a matter of federal law, and the presence of a civil liberties issue. When several of these cues are present in a case, the likelihood of Supreme Court review increases.

Other scholars have concluded that the justices' votes on certiorari reflect strategic considerations. Their votes to hear cases or to deny certiorari are designed to advance their views on constitutional policy. Two considerations are involved: the justices' perception of whether the lower court decided the case correctly and their perception of how the Supreme Court is likely to rule on the case. Thus, justices may vote for review when they disagree with a lower court's ruling in order to "correct" the perceived error and establish precedent that reorients lower court decisions. But justices may vote against granting certiorari, despite disagreeing with a lower court's ruling, if they believe that the Court will affirm the lower court. As one justice explained, the concern in such circumstances is damage control: "I might think the Nebraska Supreme Court made a horrible decision, but I wouldn't want to take the case, for if we take the case and affirm it, then it would become a precedent."[36] Yet interviews with the justices suggest that legal considerations—conflicts among the circuits, the legal importance of the issue—also figure heavily in the justices' votes on certiorari. In sum, it appears that the legal or political importance of the issue, the lower courts' rulings on the issue, the parties to the case, and the justices' own policy views all factor into the decision to grant or deny certiorari.

Information Gathering

To decide a case, the Supreme Court needs information about the facts, the applicable law, and the likely consequences of its decision. Under our adversary system, the justices look to the litigants in the case for much of this information. The attorneys for each party file legal briefs and then argue the case orally before the justices. Other groups interested in the outcome of the case may, with the Court's permission, also submit legal briefs called *amicus curiae*—literally "friend of the court"—briefs. Finally, the justices rely on the record of proceedings and the opinions of the lower courts.

Legal Briefs Legal briefs are first and foremost partisan documents, designed to persuade the Court to rule in favor of one's client or position. This persuasion takes the form of marshaling and interpreting pertinent legal materials—precedents, statutes, constitutional provisions—and factual information in a manner that favors one's client and supports one's position.

For *amicus curiae* briefs, as well as for briefs submitted by the litigants, the goal is to gain a favorable ruling. Typically, those who file *amicus* briefs are more interested in the constitutional issue raised by the case than in the fate of particular litigants. Some organizations file *amicus* briefs out of concern for the effects the Court's decision might have on them or their members. Twenty-seven states, for example, submitted a brief in *Miranda v. Arizona* urging the Court not to get involved in setting standards for police interrogations. For other groups the concern is primarily ideological. Thus, the American Civil Liberties Union, a group committed to a broad interpretation of constitutional rights, also filed a brief in *Miranda* urging the Court to extend the rights of the accused. Some groups file *amicus* briefs to signal to the Court that their members care about the issue—thus 136 groups filed *amicus* briefs in *National Federation of Independent Business v. Sebelius*, the constitutional challenge to the Affordable Care Act ("Obamacare"). Finally, on occasion groups may file *amicus* briefs because they lack confidence in the lawyer arguing the case and hope to win the case through the arguments advanced in their briefs.[37]

Oral Argument During oral argument, the attorneys for each party have their final opportunity to influence the Court's ruling. Early in the nation's history, when the Court's docket was less crowded, the oral argument in a case could extend over several days, and the flowery oratory of the attorneys attracted large audiences. Daniel Webster is reported to have moved those in the Court to tears as he concluded his argument in *Dartmouth College v. Woodward*.[38] But as the demands on the Court's time increased, it cut back on the time available to each party for oral argument, limiting each side to 30 minutes except in those rare circumstances in which the importance and complexity of a case justified additional time. Thus, when the Court in 2012 allowed each side three hours of oral argument during the constitutional challenge to the Affordable Care Act ("Obamacare"), it was the longest oral argument in 45 years.

Yet when COVID struck, oral argument changed. The Court replaced in-person oral argument with oral argument via conference call. Instead of justices being free to interrupt and ask questions of the attorneys at any point, each justice was allotted a set amount of time to ask questions. When in-person oral argument resumed in 2021, the Court retained elements of both approaches. Justices were free to intervene as desired during the early part of oral argument, but this was followed by questioning by the justices in order of their seniority, inevitably producing longer oral arguments.

Yet whatever the length of oral argument, it is not an opportunity to make a set speech. The justices pepper the attorneys with questions, testing the soundness of the legal positions they are advancing. These questions may force attorneys to confront weaknesses in their arguments or to clarify the implications of the positions they are urging. But if oral argument can be harrowing, it also provides a unique opportunity. As Chief Justice William Rehnquist observed, "It is the only time before conference discussion of the case later in the week when all of the judges are expected to sit on the bench and concentrate on one particular case."[39]

Does oral argument make a difference? Many justices insist that it does. According to Justice Antonin Scalia, "Things can be put in perspective during oral argument in a way that they can't in a written brief." In response to the justices' questions, attorneys can correct misunderstandings, demonstrate unappreciated strengths in their positions, and remove obstacles to the justices voting for their clients. Moreover, justices may use oral argument as a way to influence their colleagues. As Justice Anthony Kennedy put it, during oral argument "the Court is having a conversation with itself through the intermediary of the attorney." And even when oral argument does not change votes, it may influence the substance of the opinions written in a case.[40]

Decision Making

During the Court's term, the justices meet in conference twice a week to consider the cases that have been argued. Only the justices are present at these conferences. On Wednesday afternoons, they discuss and vote on the four cases argued the previous Monday, and on Fridays the justices consider the cases argued on Tuesday and Wednesday. The chief justice begins the discussion of each case by summarizing the facts and legal arguments and offering his own views on how it should be decided. The senior associate justice then explains his views, and the remaining justices follow in order of seniority. By the time their turns arrive, the most junior justices may have little new to offer other than their votes. When all the justices have spoken, the chief justice tabulates the justices' votes and announces the Court's tentative decision.

These deliberations have little of the sharp give-and-take found in legislative debate. In fact, according to Chief Justice Rehnquist, there was surprisingly little interplay among the justices at conference, and Justice William Douglas observed that conference discussions rarely changed a justice's view of the case. This may reflect the format for discussion: Allowing each justice to express his or her views without interruption is hardly conducive to lively debate.

Also, in comparison with legislators, the justices have few means for influencing the votes of fellow justices. Judicial ethics preclude them from offering to trade votes to gain support on issues of importance to them. And, given judicial independence, justices cannot bring outside pressures to bear on their colleagues. Their main source of influence is the quality of the arguments they can marshal. If the chief justice is also the intellectual leader of the Court, then his power to frame the issues—and thereby direct the course of debate—can give him some advantage. An associate justice also may exhibit the intellectual acuity and force of personality necessary for leadership on the Court, as Justice William Brennan did during the 1960s and 1970s. Still, it is difficult to present a fully developed argument on complex legal issues orally, and it is certainly difficult to follow such an argument. Intellectual leadership on the Court is most likely to manifest itself in the opinions written by the justices.

Once the Court has reached its tentative decision on a case—the vote in conference is only tentative because justices can change their minds up to the time the decision is announced—a justice is assigned to write the opinion of the Court. If the chief justice has voted with the majority, then he assigns the opinion of the Court to himself or to another member of the majority coalition. When the case is a momentous one, the chief justice typically assigns himself the opinion, as Chief Justice Warren did in *Brown v. Board of Education*, and as Chief Justice Burger did in *United States v. Nixon*. If the chief justice is in dissent, then the senior associate justice aligned with the majority assigns the opinion of the Court. Other justices remain free to write concurring or dissenting opinions, and often do.

Writing opinions is a long and difficult process. Most justices assign their clerks to draft the initial version of opinions, along lines specified by the justice. Once the justice has made whatever changes seem appropriate, the draft opinion is circulated among the justices. Other justices may also circulate concurring and dissenting opinions, seeking support for their views. The justices carefully scrutinize the opinions that are circulated and often return them with requests for changes, sometimes making such changes a condition for joining the opinion.

Particularly crucial are the negotiations over the opinion of the Court, because the justice assigned the opinion must craft an opinion that can gain the support of five justices. Often an opinion goes through several drafts before it is accepted. Sometimes deep-seated divisions prevent a majority from coalescing behind a single opinion. In *Webster v. Reproductive Health Services*, for example, a majority of five justices upheld various state restrictions on abortions, but Justices Antonin Scalia and Sandra Day O'Connor refused to join Chief Justice Rehnquist's opinion and filed separate concurring opinions. When no opinion commands a majority of the Court—and this has become increasingly common—it complicates the efforts of lower court judges to determine the exact meaning of the Court's ruling.

The opinion-writing phase provides an opportunity for further reflection, and justices may change their votes after reading the draft opinions. Indeed, on occasion justices assigned to write the opinion of the Court have reported back that additional research had led them to change their votes. In a closely divided court, defection by a single justice can produce a new majority and, with it, a different decision. This does not happen often: one study found that the justices' final votes differed from those in conference 9 percent of the time, but usually the changes served to increase the size of the Court majority rather than to create a new majority, as justices merely refrained from dissenting.[41]

Even if no votes change, the opinion-writing phase is crucial. The Court's decisions have a dual aspect, resolving particular disputes and announcing legal standards to be applied in future cases. Often the grounds on which the Court decides, or the breadth of the legal principles it announces, is as important as the vote itself. In *Miranda v. Arizona*, for example, the Court not only overturned Miranda's conviction but also used the case to establish standards governing all future police interrogations. By framing the opinion this way, the Court ensured that its decision would have a broad effect. In contrast, in *Webster v. Reproductive Health Services* the justices upheld state restrictions on abortion but did so on narrow grounds so as to avoid overruling *Roe v. Wade*, which established a constitutional right to abortion. By leaving open the question of whether *Roe* remained a viable precedent, the Court encouraged further litigation on the issue.

Promulgating Decisions

The Supreme Court term follows a predictable pattern. Oral argument commences on the first Monday in October but, because preparing opinions is time consuming, the Court does not begin announcing decisions immediately. Early in the term, it follows the traditional practice of announcing its decisions on Mondays ("decision Mondays"). As the term rushes toward its conclusion, the increasing number of decided cases leads the Court to announce decisions on other days as well. By the conclusion of the Court's term in late June or early July, it will have decided and written opinions in 60–80 cases.

The Court jealously guards the secrecy of its decisions. Once the opinions in a case are written, they go to the print shop in the basement of the Court, which prepares copies for transmission to reporters and the general public. In the print shop, each copy of an opinion is numbered to prevent any from being removed from the premises. "Leaks" are rare; reporters are not even informed ahead of time which decisions the justices will announce that day. So when Justice Alito's draft opinion of the Court in *Dobbs v. Jackson Women's Health Organization*, a much-anticipated ruling on abortion, was leaked to reporters and published, it created a sensation. Chief Justice Roberts launched an investigation to discover the source of the leak, but the year-long inquiry failed to uncover the leaker's identity.

The Court announces its decisions in open court. Usually, the justice who wrote the opinion of the Court announces the decision, and justices who filed concurring or dissenting opinions may also state their views. In the past, justices used to read their full opinions from the bench, but time pressures have eliminated that practice. Still, justices may occasionally read portions of their opinions or offer extemporaneous remarks about a case.

While the justices are announcing the Court's decisions, the Court's press office releases copies of the opinions to reporters. Although most members of the general public will get their notions of the Court's rulings from the news stories the reporters file, the Court's opinions are available from a variety of other sources. The official source for the Court's rulings is United States Reports, a set of bound volumes containing all the Court's opinions and other actions. The Court's rulings are also available online from various sources, including www.supremecourt.gov and www.law.cornell.edu.

Other Appellate Courts

Agenda Setting The U.S. Supreme Court's power to decide which cases it will hear distinguishes it from most other appellate courts. First-level appellate courts, such as federal courts of appeals and state intermediate appellate courts, have no control over their dockets. Because all litigants are entitled to an appeal, these courts must hear whatever cases are brought before them. Most second-level appellate courts, such as state supreme courts, also have only limited control over their dockets. Statutes or constitutional provisions in most states mandate that their supreme courts hear certain types of appeal. States with the death penalty, for instance, generally require their supreme court to review convictions in all cases in which a defendant has been sentenced to death. Beyond that, the states vary in the mandatory jurisdiction they assign to their supreme courts, although only about 15 percent of all appeals are mandatory. These constitutional or statutory mandates increase the caseloads of state supreme courts—most hear many more cases per year than the U.S. Supreme Court—and may burden them with cases of little legal importance.

Information Gathering As previously noted, the U.S. Supreme Court obtains information for its decision making from the briefs of the parties in the case, *amicus curiae* briefs, and oral argument. But *amicus curiae* briefs are less often filed in cases before other appellate courts, because some appeals raise issues of interest solely to the parties, without the broad legal significance that attracts groups to a case. Other appellate courts also rely less heavily on oral argument, either dispensing with it altogether or reserving it for complex or important cases, and decide most appeals on the basis of the briefs of the parties and the lower court record.

Decision Making Because appellate courts are multimember courts, appellate decision making necessarily has a group dimension. The process of decision making on many appellate courts resembles that on the U.S. Supreme Court; that is, the judges meet in conference, and the writing of the opinion of the court is assigned to a member of the majority coalition following the vote in conference. A few state appellate courts rotate opinion assignments, so that a judge is assigned the opinion in a case even before it is argued. Under this system, the judge assigned the opinion tends to be far more knowledgeable about the case than his or her colleagues, and they therefore may defer to the assigned judge's view of how it should be decided.

When cases merely resolve disputes between the contending parties and have no broader legal significance, some appellate courts do not issue opinions but merely announce their decisions. When they are published, most appellate court opinions are shorter than those authored by Supreme Court justices. Judges on other appellate courts also tend to file fewer concurring or dissenting opinions. On some courts, dissent is rare, perhaps because of a tradition of unanimity, a homogeneous group of judges, or the routine character of the cases they decide. But when judges belong to different political parties, dissent may be more frequent, particularly in cases with important policy implications.

Promulgating Decisions Few decisions of state appellate courts and lower federal courts attract the sort of public attention given to Supreme Court rulings. Indeed, some are of such minimal interest, even to the legal profession, that the court merely announces its decision without writing an opinion in the case. Yet some decisions have significant effects within the border of a state—for example, rulings relating to COVID restrictions—or may be indicative of broader developments within the nation—for example, rulings on the constitutionality of restrictions on abortion imposed by state legislation in the wake of the U.S. Supreme Court's overruling of *Roe v. Wade*.

Beyond Trials and Appeals

This chapter examined the conduct of trials and the review of trial court rulings by appellate courts. Important as these processes are, they comprise only a small portion of the activities of U.S. courts. Appellate courts can review lower court rulings only if litigants appeal those rulings, and most litigants do not appeal. Trial courts can conduct trials only when there is an ongoing dispute between two parties. In criminal cases, however, most defendants plead guilty before trial, and, in most civil cases, parties settle rather than go to trial. Thus, a complete understanding of court operations requires looking beyond the formal processes of trial and appeal, and the next two chapters do so.

NOTES

1 Richard Gabriel, *Acquittal: Secrets of a High-Profile Trial Consultant* (New York: Berkeley Publishing, 2014), p. 19.

2 Alan M. Dershowitz, *Reversal of Fortune* (New York: Random House, 1986), p. vii. A film about the case, *Reversal of Fortune*, was based on Dershowitz's book.

3 Quoted in Dershowitz, *Reversal of Fortune*, p. xvii.

4 Quoted in William Wright, *The von Bülow Affair* (New York: Delacorte, 1983), p. 354.

5 Lawrence M. Friedman, *A History of American Law*, 3rd ed. (New York: Simon & Schuster, 2005), p. 437.

6 Stephen J. Schulhofer, "Is Plea Bargaining Inevitable?" *Harvard Law Review* 97 (March 1984): 1096.

7 Barbara Yngvesson and Patricia Hennessey, "Small Claims, Complex Disputes: A Review of the Small Claims Literature," *Law and Society Review* 9 (Winter 1975): 219–274.

8 *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1951).

9 *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

10 *Gideon v. Wainwright*, 372 U.S. 335, 348 (1963).

11 Supreme Court rulings extending the right to counsel in criminal cases include *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Gideon v. Wainwright*, 372 U.S. 335 (1963); and *Argersinger v. Hamlin*, 407 U.S. 25 (1972). State rulings include *Carpenter v. Dane*, 9 Wis. 249 (1859); and *Cogdill v. State*, 246 S.W.2d 5 (Tennessee, 1951).

12 Jon M. Van Dyke, *Jury Selection Procedures* (Cambridge, MA: Ballinger, 1977), p. 180.

13 Pertinent cases include *Batson v. Kentucky*, 476 U.S. 79 (1986); *Powers v. Ohio*, 499 U.S. 400 (1991); and *Georgia v. McCollum*, 505 U.S. 42 (1992).

14 Jeffrey Toobin, *The Run of His Life: The People vs. O. J. Simpson* (New York: Random House, 1996), pp. 196–197.

15 Gabriel, *Acquittal*, p. 240.

16 Darrow's and Spence's remarks are recounted in Stephen J. Adler, *The Jury: Trial and Error in the American Courtroom* (New York: Random House, 1994), pp. 53–55.

17 Franklin Strier and Donna Shestowsky, "Profiling the Profilers: A Study of the Trial Consulting Profession, Its Impact on Trial, Justice, and What, If Anything, To Do About It," *Wisconsin Law Review* (1999): 459.

18 Maxwell M. Blecher and Robert M. Lindquist, "Opening Statements," in *Civil Trial Practice: Strategies and Techniques*, ed. William A. Masterson (New York: Practicing Law Institute, 1986), p. 115.

19 E. Allen Lind and Gina Y. Ke, "Opening and Closing Statements," in *The Psychology of Evidence and Trial Procedure*, eds. Saul M. Kassin and

Lawrence S. Wrightsman (Beverley Hills, CA: Sage Publications, 1985), p. 234.

20 Jerold S. Solovy and Robert L. Byman, “Direct Examination,” in Masterson, *Civil Trial Practice*, p. 134.

21 Paul A. Renne, “Final Argument,” in Masterson, *Civil Trial Practice*, p. 293.

22 *Williams v. Florida*, 390 U.S. 78 (1970); *Ballew v. Georgia*, 435 U.S. 223 (1978). In federal courts, 12-member juries are required in criminal cases, and no fewer than six-member juries in civil cases. See *Thompson v. Utah*, 170 U.S. 343 (1898), and *Colgrave v. Battin*, 413 U.S. 149 (1973).

23 *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Burch v. Louisiana*, 441 U.S. 130 (1979). Under rules for federal courts established by the Supreme Court, all verdicts in federal cases must be unanimous.

24 See Reid Hastie, Steven D. Penrod, and Nancy Pennington, *Inside the Jury* (Cambridge, MA: Harvard University Press, 1983); Hans Zeisel and Shari Diamond, “Convincing Empirical Evidence on the Six Member Jury,” *University of Chicago Law Review* 41 (1974): 281–295; and Robert Roper, “Jury Size: Impact on Verdict’s Correctness,” *American Politics Quarterly* 7 (1979): 438–452.

25 *Ramos v. United States*, 590 U.S. ___ (2020).

26 *In re Japanese Products Antitrust Litigation*, 631 F.2d 1069, 1084 (3d Cir. 1980). For a different perspective, see Peter Sperlich, “The Case for Preserving Trial by Jury in Complex Litigation,” *Judicature* 65 (March–April 1982): 395–419.

27 Harry Kalven Jr. and Hans Zeisel, *The American Jury* (Chicago, IL: University of Chicago Press, 1971).

28 Ibid., chaps. 5–6 and 18–22.

29 Alexis de Tocqueville, *Democracy in America*, ed. Harvey C. Mansfield and Delba Winthrop (Chicago, IL: University of Chicago Press, 2000), p. 262.

30 The compulsory flag salute was upheld in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). Justices Black, Douglas, and Murphy repudiated their *Gobitis* votes in *Jones v. Opelika*, 316 U.S. 584 (1942). The Court overruled *Gobitis* in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

31 Stephen L. Wasby, *The Supreme Court in the Federal Judicial System* (New York: Holt, Rinehart, and Winston, 1984), p. 155.

32 *Escobedo v. Illinois*, 378 U.S. 478 (1964).

33 Liva Baker, *Miranda: Crime, Law and Politics* (New York: Atheneum, 1983), p. 98. *Miranda v. Arizona*, 384 U.S. 436 (1966).

34 *Rucho v. Common Cause*, 588 U.S. ___ (2019).

35 The Court finally struck down state laws forbidding racial intermarriage in 1967, 13 years after *Brown v. Board of Education*, 347 U.S. 483 (1954), in the aptly named *Loving v. Virginia*, 388 U.S. 1 (1967).

36 Quoted in H. W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Cambridge, MA: Harvard University Press, 1991), p. 200. On strategic voting on certiorari, see Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington, D.C.: CQ Press, 1998).

37 Briefs filed in cases before the U.S. Supreme Court are available online at the website of the Supreme Court: www.supremecourt.gov.

38 David M. O'Brien, *Storm Center: The Supreme Court in American Politics*, 11th ed. (New York: Norton, 2017), p. 241, discussing *Dartmouth College v. Woodward*, 4 Wheat. 518 (1819).

39 William H. Rehnquist, *The Supreme Court*, 2nd ed. (New York: Knopf, 2001), p. 244.

40 The quotation from Justice Scalia is drawn from O'Brien, *Storm Center*, p. 246; and the quotation from Justice Kennedy from Rehnquist, *The Supreme Court*, pp. 254–255.

41 Saul Brenner, "Fluidity on the United States Supreme Court: A Reexamination," *American Journal of Political Science* 24 (August 1980): 526–535.

6

Criminal Justice and the Courts

Most of those accused of a crime plead guilty rather than go to trial. Although the frequency of guilty pleas varies from jurisdiction to jurisdiction, defendants plead guilty in more than 80 percent of felony cases—those involving serious crimes—and in an even larger percentage of misdemeanor cases. Therefore, this chapter focuses on criminal cases that do not go to trial. It first identifies the major actors in the criminal justice process and follows them from arrest to guilty plea and sentencing. It then discusses plea negotiations, or plea bargaining, which frequently precedes guilty pleas. Finally, the chapter examines policy debates over the exclusionary rule, the insanity defense, the sentencing and incarceration of criminals, capital punishment, and drug courts.

PROSECUTORS AND DEFENSE ATTORNEYS

Prosecutors

Known in different jurisdictions as the district attorney, the state's attorney, or the U.S. attorney, the prosecutor is the community's chief law enforcement official. Federal prosecutors are appointed by the president with the advice and consent of the Senate. Most state prosecutors are elected locally and have a political base that enables them to operate independently of the state's attorney general. In some rural jurisdictions, prosecutors serve part-time while maintaining a private practice. But usually the prosecutor has a full-time position and a staff of assistant prosecutors to help deal with the heavy workload of criminal cases. Many assistant prosecutors are recent law school graduates seeking

DOI: 10.4324/9781003440055-8

litigation experience before moving on to other positions, so turnover in a prosecutor's office is high.

Prosecutors are the most powerful officials in the criminal courts because of the broad discretion they exercise. If they decide not to file charges in a case, the suspect is released. If they do decide to file charges, prosecutors can determine what crimes a defendant is charged with and, as a result, the potential punishment that the defendant faces. At later stages of the criminal process, they may decide whether to seek a grand jury indictment, oppose bail for a suspect, drop or reduce charges they initially filed, and plea bargain—or refuse to plea bargain—with defendants.

In exercising this discretion, assistant prosecutors are guided by the policies and expectations of the prosecutor who heads the office. But they have considerable leeway in conducting cases, as long as they safeguard the prosecutor's reputation by maintaining a high conviction rate. The emphasis on convictions affects how assistant prosecutors view cases. Often "they prefer dismissing charges to subjecting themselves to possible criticism for 'losing'."[1]

Defense Attorneys

The Sixth Amendment and analogous state constitutional provisions guarantee defendants the right to counsel in criminal cases. As a result of the Supreme Court's decision in *Gideon v. Wainwright* (see Chapter 2), states are required to furnish counsel to indigent defendants in felony cases. A later Supreme Court ruling, *Argersinger v. Hamlin* (1972), extended this right to counsel to all cases in which the defendant could be sentenced to jail or prison.[2] Some states have gone even further, providing counsel to all indigents charged with misdemeanors. Before these initiatives, many indigent defendants had no legal representation, which was a severe disadvantage, so the requirement that counsel be provided to them revolutionized American criminal justice.

Because most defendants are indigent, they cannot afford a private attorney; thus, relatively few lawyers specialize in criminal defense. States and localities provide legal representation at trial for about 80 percent of defendants at a cost of more than $1.2 billion annually, using three different approaches.

1. *Public defender programs*. A public defender is an attorney employed by government whose sole responsibility is to represent indigent defendants. Congress provides funding for the federal public defender program, and 22 states provide all funding for their public defender programs. In other states, the cost of representing indigent defendants is usually shared by state, county, and local governments.

Compensation for public defenders tends to be low, and many public defenders, like their counterparts in the prosecutor's office, are recent law school graduates who do not remain in the public defender's office their entire careers.

Defendants may be suspicious of public defenders, because they are paid by the government that is prosecuting them. Most public defender offices are underfunded and understaffed, so the caseloads assigned to public defenders are often overwhelming, affording them inadequate time to prepare and investigate all the cases assigned to them.

2. *Assigned counsel systems.* Assigned counsel systems operate in more than three-quarters of the counties in the United States, primarily in less populous counties. Under an assigned counsel system, the judge appoints private attorneys from a list of available lawyers to represent indigent defendants. In a few jurisdictions, this service is considered a professional obligation, and the attorney is not paid; but in most the lawyer receives a reduced fee. Although this system disperses the responsibility of defending the poor among all practicing attorneys, the defendant runs the risk of being represented by a lawyer who lacks expertise in criminal law. Also, given the low hourly rate paid under this system, attorneys who rely on assigned cases for their livelihood may take on far too many cases. For example, in 2000, one New York City attorney was appointed to represent 1600 defendants, earning $125,000. An overburdened attorney may not be able to devote adequate time to clients' cases, nor can such an attorney afford to take many cases to trial.[3]
3. *Contract systems.* Some communities have experimented with contract systems under which the government awards defender services contracts to individual attorneys or private law firms, which agree to provide representation for a specified dollar amount. The concerns with assigned counsel systems also apply here. The danger is that the government will emphasize reducing costs over providing effective representation, and the quality of criminal defense may suffer.

THE PROCESS OF CRIMINAL JUSTICE

Figure 6.1 illustrates the sequence of events in the criminal justice system, from the commission of a felony to the final disposition of a case. Until the initial appearance in court, the process is similar for misdemeanors. However, unlike those accused of felonies, most defendants in misdemeanor cases plead guilty at their initial appearance in court. They may do so because the costs of making bail and paying an attorney, as well as

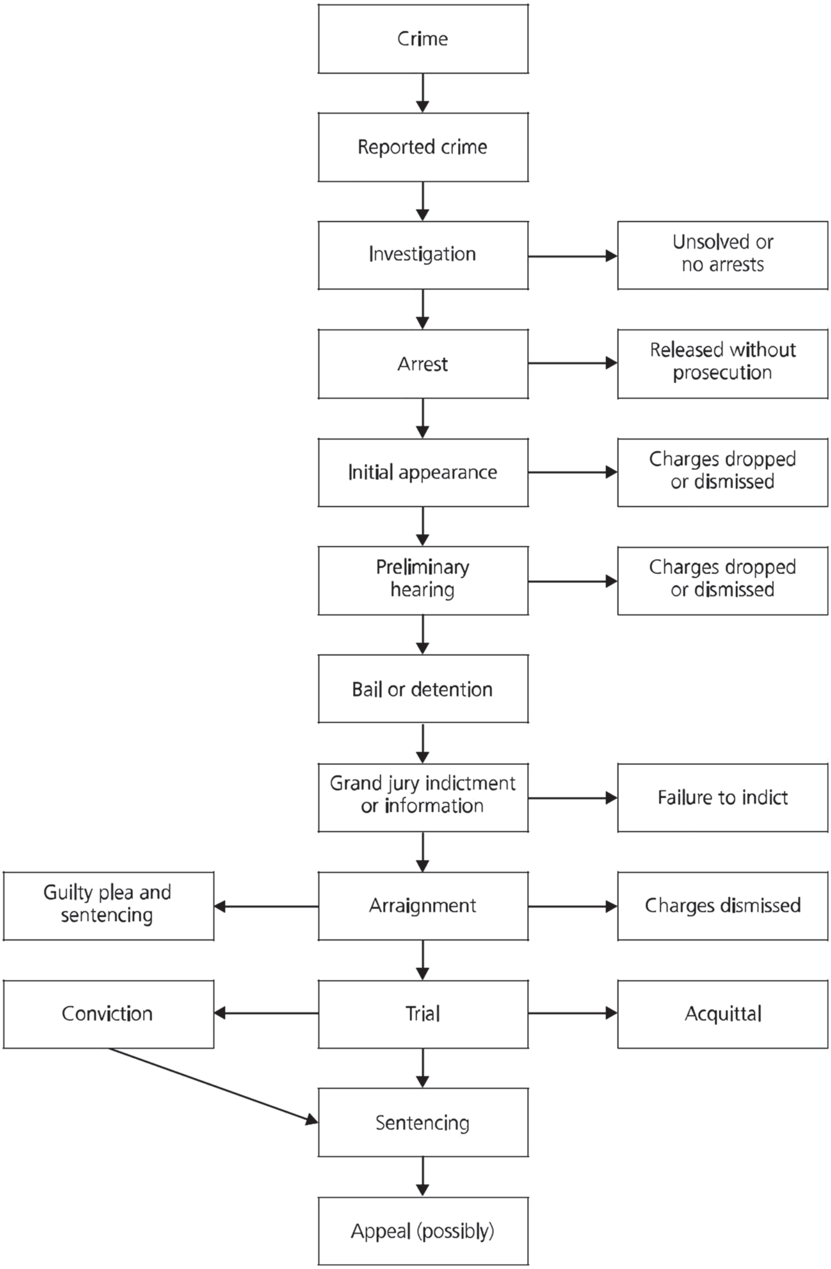

Crime
Reported crime
Investigation
Unsolved or no arrests
Arrest
Released without prosecution
Initial appearance
Charges dropped or dismissed
Preliminary hearing
Charges dropped or dismissed
Bail or detention
Grand jury indictment or information
Failure to indict
Guilty plea and sentencing
Arraignment
Charges dismissed
Conviction
Trial
Acquittal
Sentencing
Appeal (possibly)

FIGURE 6.1 Serious Crimes and Criminal Justice.

SOURCE: Adapted from *The Challenge of Crime in a Free Society* (Washington, D.C.: President's Commission on Law Enforcement and Administration of Justice, 1967).

the prospect of docked wages and possible loss of a job because of days spent in court or in jail awaiting trial, are more burdensome than the penalties for conviction (usually a fine, probation, or both). As Malcolm Feeley has observed: "The time, effort, money, and opportunities lost as a direct result of being caught up in the system can quickly come to outweigh the penalty that issues from adjudication and sentence." Or more succinctly, "The process is the punishment."[4]

For those accused of felonies, however, the potential penalty upon conviction may be severe, so defendants may be less willing to admit their guilt: the more serious the charges, the more likely a trial. Or defendants may be willing to admit guilt only in exchange for some concession from the prosecution. As a result, processing felony cases is more drawn out and complex. Key aspects of the process include: (1) the commission of the crime and the arrest, (2) the prosecutor's charging decision, (3) the setting or denial of bail, and (4) the official accusation of the accused through a felony indictment by a grand jury or other procedures.

Crime and Arrest

Most crimes are never solved, and their perpetrators never arrested or punished. What accounts for this? For one thing, many crimes are not reported to the police. Survey data suggest that the level of crime is three times as high as that reported by the Federal Bureau of Investigation's (FBI's) Uniform Crime Reports (UCR), which are based on crime statistics submitted by police departments nationwide. Some victims of crime simply are not in a position to report offenses to the police; for example, a drug purchaser can hardly complain of being cheated by a dealer. Other victims may not report crimes because they either distrust the police or, as in the case of some rape victims, wish to avoid the unpleasantness of a police investigation and testimony at trial. Also, some victims may be in a continuing relationship with an offender—for example, in incidents of domestic violence—and they may either be too intimidated to report offenses, or they may wish to deal with the problem privately. Some crimes, such as minor thefts, are viewed by victims as not important enough to report. Finally, some crimes, such as illegal gambling or underage drinking, do not have an identifiable victim and thus go unreported.[5]

Even when crimes are reported, most perpetrators are never arrested. However, clearance rates vary from offense to offense. The highest clearance rates are for victimless crimes; typically, the discovery (report) of the crime and the arrest are made simultaneously by a police officer. Arrest rates tend to be higher for violent crimes such as aggravated assault and rape, in which the victim may be able to identify the assailant, than for crimes against property—such as auto theft and burglary—which may occur without the presence of the victim. Most arrests depend not on investigative work by the police but on immediate or almost immediate apprehension of a suspect. According to one study, 56 percent of felony arrests took place either at the scene of the crime or nearby, with another 24 percent occurring because the victim could identify the offender.[6]

Charges and Dismissals

As Figure 6.2 confirms, "in the real world, an arrest rarely ends anything."[7] In none of the four cities in the figure were as many as one-third of those arrested in felony cases convicted of felonies. Prosecutors dismissed many cases or downgraded them to misdemeanors and sent them to a trial court of limited jurisdiction. Some cases sent to the lower court were dismissed there. Thus, although most cases that were prosecuted resulted in convictions, large numbers of cases were not prosecuted.

The most important factor leading prosecutors to dismiss cases is the absence of evidence sufficient to prove guilt beyond a reasonable doubt.[8] Potential witnesses may be reluctant to testify or may lack credibility because they have, for example, criminal records or a drug or alcohol dependency. Complainants may also withdraw their complaints, especially if they had a prior relationship with the accused and have reconciled their differences. This occurs most often in intrafamily disputes. Even if there is sufficient evidence to convict, prosecutors may dismiss potentially convictable cases when they believe that prosecution will not serve the cause of justice. For example, a prosecutor may not file charges against a person arrested for a minor felony to avoid giving a criminal record to a first-time offender.

If the prosecutor files charges, the defendant is brought to court for his or her initial appearance, usually before a judge in a court of limited jurisdiction. At this stage, most defendants accused of ordinance violations and minor misdemeanors plead guilty. The judge informs those accused of more serious crimes of the charges against them, advises them of their constitutional rights, and appoints an attorney for defendants who are indigent. The judge also determines whether the defendants will be released from custody pending trial and schedules their next appearance in court.

Bail and Pretrial Release

As befits a system in which the accused is presumed innocent until proven guilty, most defendants are eligible for release before trial. In most cases the accused must post bail as a guarantee that he or she will return for

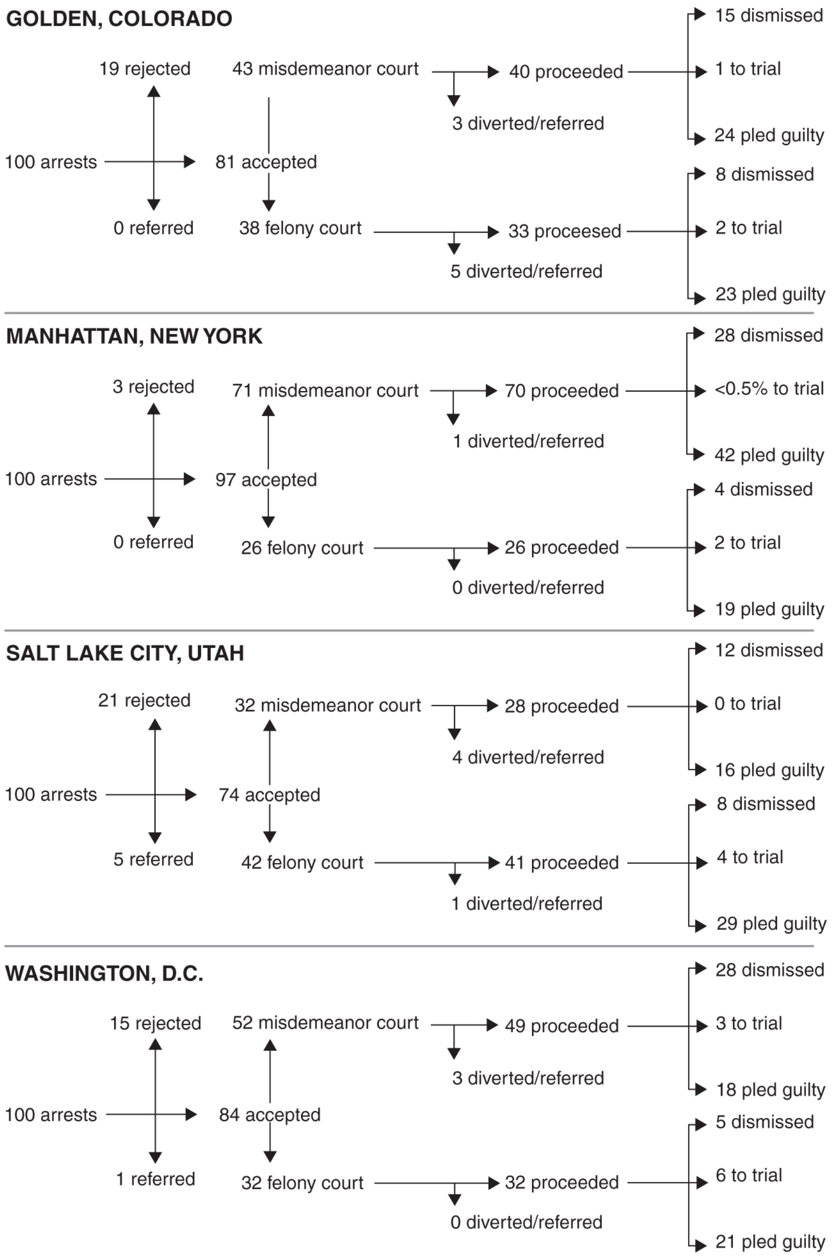

GOLDEN, COLORADO
100 arrests
19 rejected
0 referred
81 accepted
43 misdemeanor court
40 proceeded
3 diverted/referred
15 dismissed
1 to trial
24 pled guilty
38 felony court
33 proceeded
5 diverted/referred
8 dismissed
2 to trial
23 pled guilty
MANHATTAN, NEW YORK
100 arrests
3 rejected
0 referred
97 accepted
71 misdemeanor court
70 proceeded
1 diverted/referred
28 dismissed
<0.5% to trial
42 pled guilty
26 felony court
26 proceeded
0 diverted/referred
4 dismissed
2 to trial
19 pled guilty
SALT LAKE CITY, UTAH
100 arrests
21 rejected
5 referred
74 accepted
32 misdemeanor court
28 proceeded
4 diverted/referred
12 dismissed
0 to trial
16 pled guilty
42 felony court
41 proceeded
1 diverted/referred
8 dismissed
4 to trial
29 pled guilty
WASHINGTON, D.C.
100 arrests
15 rejected
1 referred
84 accepted
52 misdemeanor court
49 proceeded
3 diverted/referred
28 dismissed
3 to trial
18 pled guilty
32 felony court
32 proceeded
0 diverted/referred
5 dismissed
6 to trial
21 pled guilty

FIGURE 6.2 How Criminal Cases Are Processed.

SOURCE: *Report to the Nation on Crime and Justice*, 2nd ed. (Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, 1988), p. 71.

trial and other court proceedings. In medieval times, the accused was bailed to a third party, who was tried in place of the accused if that person failed to appear for trial. Today, bail usually involves posting a monetary bond with the court, which is forfeited if the accused fails to appear.

The bail required depends on the seriousness of the charges against defendants and on their prior criminal record—the more serious the charges and the more extensive the record, the higher the bail. As long as they do not violate the Eighth Amendment's ban on excessive bail, judges have broad discretion in setting bail. Some states have sought to eliminate undue leniency or harshness by establishing a fixed schedule that specifies the bail for various offenses. Critics claim, however, that this substitution of a "going rate" prevents judges from responding to the circumstances in individual cases.

In some jurisdictions, defendants are required to post the full amount of bail with the court. In others, defendants rely on bail bondsmen, who sign a promissory note to the court for the bail and charge defendants a non-refundable fee for their service, usually 10 percent of the bail. These systems burden indigent defendants, who may be unable to raise the money or afford the bondsman's fee. A study of 20 cities during the early 1960s found that more than half of all defendants remained in jail awaiting trial, often for months.[9] Reformers attacked this incarceration as "punishment before trial," claiming that it cost indigent defendants their jobs, undermined family relationships, and made it more difficult for defendants to mount an effective defense. More recently, several states have sought to sever the connection between indigency and pretrial confinement. Alaska, California, Illinois, New Jersey, New Mexico, and New York have largely eliminated cash bail for most offenses. Under New York's Bail Reform Act of 2019, for example, cash bail is no longer permitted on nearly all misdemeanor charges and non-violent felonies, but it is still permitted for defendants charged with a sex offense, a violent offense, witness intimidation, conspiracy to commit murder, or a terrorism-related offense. In 2021 the California Supreme Court ruled that detaining someone pretrial solely because they cannot afford bail violates the Due Process and Equal Protection Clauses.[10]

As an alternative to money bail, defendants with strong ties to the community, who are therefore unlikely to flee prosecution, may be released on their promise to appear in court. Or they may be released subject to certain nonmonetary conditions, such as that they will seek treatment or check in with court officials periodically. Adoption of these alternative release options has had dramatic effects. A study of 20 cities found that the release rate rose from 48 percent of all defendants in 1962 to 67 percent in 1971, and a more recent study of eight communities found a release rate of 85 percent.[11] Despite the liberalization of pretrial release, few defendants—fewer than 4 percent, according to one study—try to flee or otherwise fail to appear in order to avoid conviction.[12]

But as the number of defendants released before trial has risen, so has concern that they might pose a threat to the community. Research on this issue has yielded conflicting results. A study of eight communities found that 16 percent of those released were rearrested before trial and 30 percent of those rearrested were rearrested more than once. Congress responded to this concern by permitting federal judges to order the detention of defendants until trial if the judges could not otherwise "reasonably assure the safety of any other person or of the community." Most states also have required judges to consider community safety as well as the likelihood of appearance at trial in deciding on pretrial release. Critics insist there is no reliable basis for predicting criminal behavior and that some offenders will be unnecessarily confined awaiting trial while dangerous ones will be released. One study found that 62 percent of those charged with felonies in state courts were released prior to trial, with bail denied primarily to those accused of murder or other serious crimes and to those already out on bail at the time of their arrest. About a third of the released defendants were either rearrested for a new offense, failed to appear in court as scheduled, or committed some other violation that resulted in the revocation of their pretrial release.[13]

Preliminary Hearings and Grand Juries

To protect against governmental abuse of its prosecutorial power, defendants in the United States cannot be tried for a felony until the case against them has been reviewed by someone other than a law enforcement official. The prosecution must demonstrate that there is probable cause to believe that a crime was committed and that the accused committed the crime. In many states, this process of formal accusation occurs during a preliminary hearing before a lower court judge.

In federal courts and in some state courts, however, the process of formal accusation takes a different form. The Fifth Amendment to the U.S. Constitution requires that felony prosecutions in federal court be initiated by a grand jury indictment—that is, by a determination by an independent body of citizens that there is sufficient evidence to go to trial. Eighteen states likewise mandate that indictment by a grand jury precede all felony prosecutions, and six more require indictments in capital cases. In these 24 states, the defendant at the preliminary hearing is bound over to a grand jury for indictment.

The Grand Jury The grand jury differs from the trial (petit) jury in four respects:

1. *Membership and length of service.* Although the grand jury, like the trial jury, is composed of ordinary citizens, its size varies from as few as six members (in Indiana) to as many as 23 for federal grand juries. Also, whereas trial jurors sit on a single case, grand jurors are empanelled for a set term, typically three months and, during that period, the prosecutor brings a large number of cases before them for review.
2. *Function.* Grand juries do not determine the guilt or innocence of defendants but rather serve investigative and accusatory functions. In some states, grand juries investigate issues of official corruption and organized crime, but in most their primary responsibility is to determine whether there is sufficient evidence to indict defendants.
3. *Standard for decision.* In most states, trial juries in serious criminal cases can convict defendants only by a unanimous vote. Grand juries, however, indict defendants by a plurality vote—from a simple majority to a two-thirds vote, depending on state law. Moreover, the standard that grand juries use in deciding whether to indict is probable cause, rather than the more stringent standard of beyond a reasonable doubt.
4. *Mode of operation.* Unlike trials, grand jury hearings are conducted in secret, partly to protect the reputations of those against whom there is insufficient evidence to indict. Most states relax the rules of evidence that operate at trial. For example, prosecutors in a grand jury hearing may introduce hearsay or illegally seized evidence that would be inadmissible at trial. Also, in most states witnesses are not allowed to have an attorney with them during grand jury proceedings.

If a grand jury concludes that there is sufficient evidence to proceed to trial, it votes an indictment, or "true bill." If not, it votes "no true bill," and the case is dismissed. This requirement of grand jury indictment before prosecution serves, according to the U.S. Supreme Court, as "a primary security for the innocent against hasty, malicious, and oppressive prosecution."[14] But prosecutors seldom find it difficult to secure a grand jury indictment. In a single year, federal grand juries voted for more than 17,000 indictments but voted no true bill in fewer than 70 cases.[15] Even when a grand jury refuses to indict, it may be following the direction of a prosecutor who was obliged to bring a politically sensitive case before the grand jury but did not want to prosecute. Small wonder, then, that one judge concluded that most grand juries would indict a ham sandwich if the prosecutor asked them to.[16]

The Preliminary Hearing As an alternative to grand jury indictment, some states permit the prosecutor to present evidence at the preliminary hearing that the defendant has committed the crimes with which he is charged. The decision of whether to proceed to trial then rests with the judge presiding over the hearing. If the prosecutor fails to establish probable cause, the judge dismisses the charges, and the defendant is released. If probable cause is established, the defendant is held for trial.

Jurisdictions vary in how they conduct their preliminary hearings. In some jurisdictions, preliminary hearings resemble miniature trials, with both prosecutor and defense attorney calling and cross-examining witnesses. But in most jurisdictions, preliminary hearings are perfunctory proceedings lasting only a few minutes, with the main evidence presented by a police officer testifying from a police report. In a few jurisdictions, the preliminary hearing is used to screen cases, with judges either dismissing cases or reducing charges in many instances. But overall, fewer than 2 percent of defendants have their cases terminated at preliminary hearings. In jurisdictions in which judges routinely find that probable cause exists, defendants often waive their right to a preliminary hearing.

PLEA BARGAINING

As we have seen, the American criminal justice system is designed to screen out weak cases early in the process. In most cases that are not screened out, the prosecutor believes there is strong evidence of guilt, and most cases that are prosecuted result in convictions (see Table 6.1). More than two-thirds of defendants who go to trial are found guilty. But more than 90 percent of criminal cases are resolved through a defendant's admission of guilt before trial. Typically, defendants plead guilty with the expectation that they will receive some consideration in exchange for their plea, such as a reduction in the number or severity of the charges against them, a more lenient sentence, or both. Often this expectation is based on an agreement negotiated between the prosecutor and the defense attorney and ratified by the judge. The process by which such agreements are negotiated is known as plea bargaining.

The Process of Plea Bargaining

Plea negotiations are generally initiated by the defense attorney, whether public defender or private counsel, rather than by the prosecutor. When a defense attorney believes that a client is likely to be convicted at trial,

TABLE 6.1 U.S. Crime Rate per 100,000 Population

Year	Violent Crime Rate
1964	190.6
1969	328.7
1974	461.1
1979	548.9
1984	539.9
1989	666.9
1994	713.6
1999	523.0
2004	463.2
2009	431.9
2014	375.7
2019	366.7

SOURCE: FBI Uniform Crime Reports, at https://ucrdatatool.gov/Search/Crime/State/StatebyState.cfm.

the attorney may approach the prosecutor offering a plea of guilty. In exchange, the defense attorney seeks concessions relating to either the charges against the defendant or the sentence to be imposed. (See Box 6.1 for a comparative perspective on plea bargaining.)

That defense attorneys typically initiate plea negotiations suggests that most defendants whose cases progress to this stage are either guilty of criminal violations or at least likely to be convicted at trial. This is hardly surprising, given the screening of cases that occurs early in the criminal justice process. Experienced defense attorneys readily admit that most of their clients are guilty. As one put it:

> We make an initial determination whether we've got a defense, and many times we don't. When somebody's apprehended in the midst of a break-in, caught in a store or a house, you have to go some to explain what you're doing there at two or three o'clock in the morning. We get a fair number of these. If you are apprehended fleeing the scene of a crime, you are going to be hard pressed to explain why [you're] running away from the scene.[17]

Yet virtual certainty of conviction at trial does not preclude plea bargaining. Prosecutors are willing to offer concessions even in cases in which the evidence of guilt is conclusive. Thus, sometimes defense attorneys best represent their clients' interests by encouraging them to plead guilty rather than by taking cases to trial.

Box 6.1 Plea Bargaining in Comparative Perspective

Although other countries share the United States' need to process large numbers of routine criminal cases, they have developed their own mechanisms for doing so. Some countries have plea negotiations similar to those in U.S. criminal courts. In Great Britain, for example, plea bargaining flourishes despite official policies and appellate rulings discouraging the practice. One study found that 85 percent of defendants pled guilty, often changing their plea from not guilty shortly before their trial was scheduled to begin. In most cases, defendants were induced to plead guilty by concessions on the sentence they would receive and by pressure from the judge, who promised defendants a more severe sentence if they went to trial.

In Germany and many other civil-law countries, plea bargaining is unknown. Still, most routine cases are resolved without trial. The mechanism developed in Germany for disposing of such cases is called the *penal order*. Prepared by the prosecutor and signed by the judge, this order describes the wrongdoing of the defendant, the evidence gathered by the state, and the penalty to be imposed on the defendant. The penalty cannot involve imprisonment, and the most common penalties are fines or the loss of one's driver's license. If the defendant accepts the penal order—about 75 percent of defendants do—then the order becomes effective and has the same effect as a conviction after trial. If the defendant objects, then the order is nullified, and the case is scheduled for trial.

The German use of penal orders differs from plea bargaining in key respects. First, the defendant need never appear in court. If in misdemeanor cases the process is the punishment, the penal order eliminates that punishment. The closest American analogy to the penal order is the traffic ticket, which allows defendants to mail in the fine or go to court and contest their innocence. Second, penal orders involve no negotiations: no offer and counteroffer. If the accused rejects a penal order, the prosecutor cannot make a second offer; the matter must go to trial. However, the defendant's rejection of a penal order is not final; the defendant can accept the penal order, and the punishment it specifies, during the course of the trial or any time up to the court's announcement of its verdict. Finally, the defendant does not risk a harsher punishment by going to trial. The defendant can accept the penal order after the trial has commenced, so the penalty it specifies is not an inducement to forego trial; and German judges do not impose more severe punishments on those who reject penal orders and demand a trial. Thus, defendants in Germany are not penalized for asserting their rights.

SOURCES: John Baldwin and Michael McConville, "Plea Bargaining and Plea Negotiation in England," *Law & Society Review* 13 (Winter 1979): 287–307; and William L. F. Felstiner, "Plea Contracts in West Germany," *Law & Society Review* 13 (Winter 1979): 309–325.

Plea bargaining may make sense for defendants when prosecutors offer concessions in exchange for a guilty plea. A defendant may face multiple charges arising from a series of crimes or even from a single incident. For example, a person who gets drunk and takes a car for a joyride might be charged with grand larceny, possession of a stolen automobile, use of an automobile without authorization from the owner, drunk driving, and reckless driving. The prosecutor may then offer to drop some charges or reduce others—for instance, from grand larceny to petit larceny—in exchange for a guilty plea. This means that the sentence that the defendant can receive on conviction is also reduced.

If the "discount" is substantial, then the defendant may have a strong incentive to plead guilty. The prosecutor may also agree to recommend a less severe sentence or refrain from demanding a harsh one in exchange for a guilty plea. Faced with the choice between an assured sentence and the possibility of a more severe one if convicted at trial, the defendant may avoid the risk by pleading guilty.

Plea negotiations characteristically reflect established patterns of interaction between prosecutors and defense attorneys. In many jurisdictions, a single prosecutor handles all cases that arise in a particular judge's courtroom. Public defenders' offices, which represent the majority of defendants, often operate on the same basis, assigning their defenders to specific courtrooms. When defendants can afford private counsel, they typically select someone from the local criminal bar who has represented numerous defendants in that court. As a result, when a prosecutor and defense attorney—and possibly the judge—participate in plea negotiations, they usually have experience dealing with each other, sometimes in cases similar to the one under discussion.

This personal and professional familiarity helps plea negotiations by encouraging easy interaction between the attorneys. Even more important, the outcomes of negotiations in previous cases furnish a basis for resolving the prime question in any plea bargain—namely, what is an appropriate punishment for the defendant? If a defense attorney is attempting to convince the prosecutor that his client should be given probation, then he may bring up past instances in which the prosecutor agreed to probation for defendants facing similar charges. If previous defendants received jail time for the same offense, he may emphasize factors that distinguish his client from them (a stable family life, no prior criminal record) to justify a more favorable outcome. But the prosecutor independently considers how this case resembles past cases and whether any factors aggravate the situation and warrant unusual severity. Once the prosecutor and defense attorney have resolved the facts of the case—that is, the nature of the crime and the character of the defendant—their settlement of similar past cases guides them in determining what the case is worth. In other words, because both prosecutor and defense attorney share the assumption that like cases should be treated alike, plea bargains occur in a rough system of precedent in which the outcomes of past negotiations provide standards for the resolution of current ones.

If the defendant accepts the settlement the attorneys have negotiated, they then recommend that the judge resolve the case in line with their agreement. Some judges are actively involved in plea negotiations from the outset, partly to expedite the flow of cases and partly to influence sentencing, which they consider a judicial prerogative. Because they participated in the negotiations, they will, of course, ratify the plea agreement. But other judges refuse to participate in plea negotiations and are first involved with a case when they decide whether to accept the proposed plea bargain.

Although in theory judges can reject the agreements negotiated by the attorneys, they rarely do so. Because both the prosecutor and defense attorney agreed to the plea bargain, the judge may well conclude that their agreement adequately protects the interests of both the community and the defendant. The prosecutor and defense attorney also can supply the judge with information supporting their recommendation, and the judge usually has little basis for a contrary assessment of the case. Furthermore, if the judge rejects a plea bargain, the defendant may elect to go to trial, something the judge may want to avoid. Finally, the judge's desire to maintain a harmonious working relationship with attorneys who regularly practice before her promotes an inclination to accept their recommendations. As James Eisenstein and Herbert Jacob have noted, "The higher the proportion of dispositions accounted for by the same set of participants, the more interdependent they become."[18]

This interdependence of judge, prosecutor, and defense attorney enhances the judge's indirect influence over plea bargains. Prosecutors and defense attorneys, mindful that the judge can reject their recommendations, must factor the judge's views into their discussions. This anticipation and consideration of the judge's perspective means that all participants influence the outcomes of plea negotiations.

Why Plea Bargaining Occurs

Plea bargaining is most commonly viewed as a response to the case pressures that afflict all those involved in the criminal courts.[19] According to this view, which is endorsed by many judges and attorneys, escalating crime rates increased the number of cases coming to the courts, often without a corresponding increase in the resources available for dealing with them. Courts thus turned to plea bargaining to resolve cases more quickly. Underlying this view are several key assumptions: that plea bargaining, like the burgeoning caseloads that caused it, is a relatively recent phenomenon; that plea bargaining is a necessary evil rather than a conscious policy choice, a second-best means of dealing with defendants; and that with sufficient resources, courts would decide criminal cases with trials rather than by plea bargaining.

Recent research questions this account. Although U.S. courts discouraged guilty pleas during the early nineteenth century, by the early 1900s, plea bargaining had become the primary means of processing cases in many criminal courts. This can be seen not only in the frequency of guilty pleas—in 1926, more than 90 percent of all felony convictions in Manhattan and Brooklyn resulted from such pleas—but also in prosecutors' willingness to reduce charges against defendants. In New York in 1926, for instance, 85 percent of all guilty pleas in felony cases were to offenses less serious than the original charges, and in Chicago the figure was 78 percent.[20] These figures suggest that plea bargaining was as frequent in the 1920s as it is today, so subsequent increases in crime cannot explain the prevalence of plea bargaining. Also, if plea bargaining were a result of heavy caseloads, then courts with heavier caseloads would rely on plea bargaining more than would courts with lighter caseloads. That is not the case. Some low-volume courts rely heavily on plea bargaining. But some high-volume courts—those in Baltimore and Los Angeles, for example—conduct large numbers of trials.[21] So caseload pressures alone cannot account for plea bargaining.

Another common view is that prosecutors plea bargain when they lack sufficient evidence for a conviction at trial.[22] According to this view, a prosecutor's willingness to plea bargain is a sign of weakness, an indication that the aim of securing the full punishment the law allows must be sacrificed so that the accused receives some punishment. Although the strength of the evidence may affect plea bargaining, the frequency of plea negotiations shows that this explanation is inadequate. If the evidence were weak in the majority of cases, defense attorneys would plea bargain less and take more cases to trial. And if the evidence was strong in most cases, as might be expected after weak cases were screened out, then prosecutors would plea bargain less frequently. This explanation cannot account for the behavior of either defense attorneys or prosecutors, because it erroneously assumes that prosecutors regularly seek the harshest possible punishment for defendants.

But if neither caseload pressures nor evidentiary problems fully account for plea bargaining, what does? One view is that attorneys and judges engage in plea bargaining to enhance their discretion, so that they can seek what they perceive as substantive justice in each case.[23] According to this view, the participants in plea bargaining all agree that strict application of criminal law does not produce justice. Because the law necessarily defines offenses in general terms—for example, robbery and assault—and prescribes penalties, or a limited range of penalties, for them, it cannot take into account the specifics of each case. Thus, an insistence on strict application of the law means treating dissimilar cases as similar. Furthermore, when legislators enact criminal laws, the penalties they prescribe may reflect their strong disapproval of the actions they are outlawing, instead of a thoughtful consideration of what punishment is appropriate. According to this view, plea bargaining permits those who administer justice to escape the rigidity and excessive harshness of criminal law and to focus on the character of the defendant and the nature of his offense in determining punishment.

This does not mean, of course, that plea negotiations involve extended discussions about the nature of justice. Because those negotiating a plea bargain have dealt with each other on numerous occasions, previous understandings usually permit a quick determination of the "worth" of a case and the appropriate punishment. According to this explanation, then, plea bargaining is not simply assembly-line justice necessitated by heavy caseloads but rather an attempt to individualize criminal justice.

Other studies attribute the prevalence of plea bargaining less to a shared concern for substantive justice than to the shared interest of attorneys and judges in processing cases quickly. This interest in the speedy disposition of cases exists in both low-volume and high-volume courts and so does not depend on caseload pressures. For private attorneys, the desire for speedy disposition comes largely from monetary considerations. Few defendants can afford the costs—such as investigative work, trial preparation, and court time—associated with an extended trial, so private attorneys may lose money when cases go to trial. But plea bargaining enables attorneys to both benefit their clients (with reduced sentences) and to take on more cases, thus increasing their income.

For judges and for attorneys employed by the state—that is, prosecutors and public defenders—compensation does not depend on the number of cases processed. Other incentives, however, come into play. Chief among these is the desire to reduce one's workload. As Peter Nardulli has observed, "When the cases on their respective calls are completed in a given day, normally the formal work requirements of the judge, public defender, and prosecutor are fulfilled. Thus, it is in their mutual self-interest to process expeditiously the cases on the call for a given day, regardless of how many cases are scheduled."[24] Plea bargaining not only allows cases to be disposed of more quickly but also lightens the workloads of judges and attorneys, who can dispense with time-consuming preparation for trial. Also, participants in plea bargaining can justify the practice by insisting that trial is rarely warranted because weak cases are screened out early in the process. The only question in the remaining cases is the appropriate punishment for the defendant. Furthermore, each participant in plea bargaining recognizes that expeditious case processing requires a willingness to cooperate, and that the refusal to do so imposes burdens on other participants and may reduce their willingness to cooperate on future cases. In sum, the mutual interdependence of judge, prosecutor, and defense attorney, the prospect of continuing interaction among them, and the common goal of quick case processing all serve to reduce adversariness and promote the cooperative resolution of cases through plea bargaining.

Attacks on Plea Bargaining

Despite the prevalence of plea bargaining, or perhaps because of it, critics maintain that plea bargaining is an inappropriate and undesirable way of establishing sentencing policy. They insist that plea bargaining diminishes the role of the judge and gives prosecutors excessive control over sentencing decisions. Also, the discretion in sentencing that plea bargaining affords undermines the decisions on punishment established by the state legislature, in effect transferring power from a popularly elected, accountable body to officials whose actions are seldom subject to public scrutiny.

Critics also challenge the sentencing policies that plea bargaining promotes. Some charge that plea bargaining coerces defendants into waiving their constitutional right to assert their innocence by penalizing them for going to trial. If pleading guilty guarantees more lenient sentences, then the pressure on defendants to plea bargain may be considerable, especially for those who cannot raise bail and must remain in jail until trial. Other critics insist that plea bargaining leads to excessively lenient sentences, because prosecutors must offer substantial concessions to obtain guilty pleas. As a result, dangerous offenders escape the harsh punishment they deserve and soon threaten the community again. This undermines respect for the law and reduces deterrence of crime. Still other critics, noting the interdependence that develops among the participants in plea bargaining, worry that defense attorneys end up sacrificing their clients' interests to maintain good relations with prosecutors. Finally, some critics argue that because plea bargaining permits the exercise of broad discretion free from regulation and publicity, it fosters favoritism, corruption, and discrimination. At the very least, it aggravates the problem of securing equal treatment for offenders, because similar offenses may be dealt with dissimilarly in different parts of the state or even from courtroom to courtroom in the same community.[25]

Responding to these criticisms, some jurisdictions have tried to restrict or abolish plea bargaining. The most successful effort was in Alaska. In 1975, the state's attorney general, Avrum Gross, prohibited prosecutors from offering concessions as a means of obtaining guilty pleas in felony and misdemeanor cases. Gross's ban, which effectively abolished plea bargaining in the state, yielded some surprising results:[26]

- Contrary to expectations, guilty pleas in criminal cases declined only marginally, from 94 percent to 92 percent of all cases, so the number of trials increased only slightly.
- When trials were held, the percentage of defendants convicted did not decline.
- Because the number of trials did not increase substantially after the ban on plea bargaining, the courts did not experience case backlogs; the time required to process a case actually decreased.
- The conviction rates and sentences for those charged with serious violent crimes did not change as a result of the ban, suggesting that serious offenders were not escaping punishment as a result of plea bargaining.
- Those charged with less serious property offenses—such as burglary, receiving stolen property, and malicious destruction of property—tended to receive more severe sentences than before the ban. This was particularly true for first offenders.

Evaluating Plea Bargaining

What conclusions should we draw about plea bargaining? As critics claim, plea bargaining does transfer control over sentencing from state legislatures and judges operating within statutory guidelines to judges, prosecutors, and defense attorneys collectively exercising broad discretion. Yet the critics' charge that this insulates sentencing from popular control is only partly valid. As the abolition of plea bargaining in Alaska and elsewhere shows, popular efforts to reassert control can succeed. More important, studies of criminal courts in various communities confirm that public opinion, as embodied in the broader political and legal culture of the community, does constrain the participants in plea bargaining. Of course, that public opinion affects plea bargaining does not by itself legitimate the practice. The fundamental question is whether plea bargaining promotes justice in sentencing.

Other criticisms of plea bargaining seem on inspection to be complaints about the American criminal justice system in general rather than specifically about plea bargaining. Take, for example, the charge that plea bargaining creates opportunities for favoritism, discrimination, and corruption. The real question, however, is not the potential for abuse but its frequency. Even more, the question is whether such abuse is more prevalent in cases that are plea bargained than in cases that go to trial. There is no evidence that plea bargaining is more infected by corruption and discrimination than are other ways of disposing of cases.

The charge that plea bargaining promotes excessive leniency in sentencing, endangering people by putting violent criminals back on the street, likewise might be better addressed to the American criminal justice system as a whole. In actuality, the sentences defendants receive are far more severe in the United States than in most other countries, and more persons convicted of crimes are incarcerated. Indeed, recent critics of American criminal justice have attacked the frequency and length of incarceration.[27] Also, the more serious the crime, the less likely plea bargaining is to occur. Defendants charged with serious offenses, who face the prospect of serving time in prison, are more likely to take their chances at trial and less likely to plea bargain. And prosecutors, aware of community sentiment, are less willing to cut "sweet" deals with such offenders. When plea bargaining does occur in serious cases, offenders still receive lengthy sentences. The studies of sentencing in Alaska confirm this: The sentences serious offenders received when plea bargaining was legal were just as severe as those they received after it was abolished.

More troubling is the charge that, in plea bargaining, defendants are coerced into pleading guilty and waiving their constitutional right to trial. Advocates of plea bargaining note that most defendants are eager to plead guilty. They even plead guilty when, as in Alaska after the abolition of plea bargaining, they can expect no concessions for their admission of guilt. But critics insist that defendants' willingness to plead guilty and plea bargain often stems from a fear that they will be penalized if they go to trial. This fear may be groundless. Judges have insisted that they penalize defendants who demand a trial only when their demand is "frivolous"—that is, when they have no basis for contesting the charges against them. And some studies suggest that defendants who go to trial do not necessarily receive harsher sentences, although other studies contradict this.[28] What matters is that many judges and attorneys who participate in plea bargaining believe that defendants who go to trial do receive harsher sentences.[29] If defendants take their cues from what their attorneys say, they are likely to share the belief that conviction at trial will lead to a harsher sentence, and this may deter them from contesting their innocence.

Also troubling is the claim that the established working relationships among participants in plea bargaining deter defense attorneys from vigorously pursuing their clients' interests. The Supreme Court has recognized that the Sixth Amendment's guarantee of effective representation by counsel extends to plea bargaining; and when defense attorneys fail to represent them effectively in plea negotiations, defendants may seek a remedy from the courts.[30] Advocates of plea bargaining deny that the strong pressure to cooperate undermines the vigorous representation of defendants. Prosecutors, they insist, expect defense counsel to pursue legitimate avenues for acquittal and do not penalize such efforts by refusing to plea bargain. Somewhat inconsistently, advocates also contend that a less adversarial stance usually works for the benefit of defendants, who are usually guilty of the charges against them and eager to negotiate a plea. Still, many defense attorneys are ambivalent about their close relationship with prosecutors, concerned that the need to maintain harmonious relations leads them to become "part of the system." Whether plea bargaining is a legitimate and desirable element of the American criminal justice system thus remains a matter of dispute.

POLICY ISSUES IN CRIMINAL JUSTICE

Since the 1960s, when crime rates in the United States soared, conservative critics have claimed that courts were responsible for much of the rise in crime. By freeing criminals on "legal technicalities" and giving lenient sentences to those convicted, they contended, the courts allowed dangerous criminals to return to the streets and undermined the deterrent effect of criminal law. To remedy the situation, these critics proposed several changes in the way courts operate. Among these changes were the reform or elimination of the exclusionary rule, which prevents the use of illegally obtained evidence to secure convictions; the reform or elimination of the insanity defense in criminal trials; and the reform of criminal sentencing, with sharply escalating sentences for repeat offenders. Many of these changes were enacted into law.

Liberal critics too have challenged the sentencing practices of the courts, contending that those guilty of the same crime often received different sentences, with particularly harsh sentences meted out to minorities and the poor. They insist reforms are needed to ensure more equitable sentencing. Other critics have decried the incarceration of so many offenders and have sought alternatives designed to rehabilitate prisoners instead of punishing them. Finally, reformers have supported the abolition of capital punishment, bringing American practices in line with those of most other Western countries.

Both the conservative and the liberal critiques have drawn fire. Proponents of the exclusionary rule believe that it deters police from violating constitutional rights and maintains the integrity of the judicial process.[31] Supporters of the insanity defense contend that it reaffirms the moral underpinnings of criminal justice by distinguishing those who are responsible for their actions from those who are not.[32] Some researchers have challenged claims that courts are unduly lenient or that they discriminate in sentencing offenders, while others lament the loss of judicial discretion to tailor sentences to the specifics of the offense and the offender.[33] And American public opinion has continued, albeit barely, to support imposition of the death penalty.

The remainder of the chapter examines policy debates over the exclusionary rule, the insanity defense, the sentencing of criminals, drug courts, and capital punishment. Each section analyzes both the justifications offered and the objections to existing policies and practices. Each also considers empirical evidence bearing on the competing claims and assesses the consequences of reforms that have been adopted.

The Exclusionary Rule

The exclusionary rule forbids the use in a criminal prosecution of evidence illegally obtained by law enforcement officials. This evidence is usually either physical evidence, such as drugs or weapons uncovered through searches in violation of the Fourth Amendment, or confessions extracted from defendants in violation of their rights under the Fifth or Sixth Amendments. When a trial judge rules that a police officer violated the defendant's rights in securing evidence, the prosecution cannot use that evidence to obtain a conviction. Nor can it use any additional evidence obtained by following leads generated by the initial illegality—referred to as "the fruit of the poisonous tree."[34] The exclusionary rule may have an effect even before trial. If the only evidence of guilt is inadmissible, the prosecutor has no case and thus is unlikely to charge a suspect.

Yet the exclusionary rule does not immunize lawbreakers from prosecution. Prosecutors can still pursue convictions with any evidence that the police have obtained legally. Put differently, the exclusionary rule merely places the government in the same position it would have been in had the illegal search or interrogation not occurred. If a conviction is overturned on appeal because illegally obtained evidence was used to secure it, the defendant can be retried with that evidence excluded from consideration.

The Development of the Exclusionary Rule The United States is unique in its reliance on the exclusionary rule as a means of dealing with police misconduct. Great Britain, Canada, and other common-law countries admit all reliable evidence at trial but permit suits for damages against police officers alleged to have committed illegal acts. No civil-law country disciplines its police by excluding illegally seized evidence. Indeed, for most of the nation's history, U.S. courts permitted the introduction of all probative evidence at trial.

The adoption of the exclusionary rule began early in the twentieth century, when a few states banned the admission of illegally seized evidence as a matter of state law.[35] In *Weeks v. United States* (1914), the U.S. Supreme Court adopted the exclusionary rule for federal prosecutions, maintaining that the exclusion of illegally seized evidence was necessary to protect defendants' Fourth Amendment rights.[36] But *Weeks* had no direct effect on the states, which conduct most criminal prosecutions. Even after the Court applied the Fourth Amendment's search-and-seizure requirements to the states in *Wolf v. Colorado* (1949), most states did not adopt the exclusionary rule. As late as 1960, only half the states required the suppression of illegally seized evidence.[37] This changed dramatically after the Court's decision in *Mapp v. Ohio* (1961), which extended the exclusionary rule to the states.[38] Although the Supreme Court has since limited somewhat the reach of the exclusionary rule, it continues to affect what evidence is admissible at trial.[39]

Underlying the Supreme Court's decisions in *Weeks* and *Mapp* are three complementary arguments: One is that the exclusionary rule is needed to vindicate the protections of the Fourth and Fifth Amendments. Indeed, advocates of the exclusionary rule have turned the critics' rhetoric back on them. If *Mapp* inaugurated a constitutional revolution, the obvious question is why? After all, the ruling did not institute any new requirements for searches and seizures. The answer, according to proponents of the exclusionary rule, is that before *Mapp* the Fourth Amendment's requirements were routinely ignored. If that is true, it demonstrates that other remedies did not adequately secure Fourth Amendment rights.

The Court also claimed that the exclusionary rule safeguards rights by deterring police misconduct. By prohibiting convictions on the basis of illegally seized evidence, the rule removes the incentive for police to gather evidence illegally. As a result, fewer unconstitutional searches or interrogations will occur. Thus, the exclusionary rule not only vindicates the rights of a defendant subjected to an illegal search or interrogation but also deters future police misconduct, thereby protecting all citizens. Finally, the Court maintained that the exclusionary rule protects the integrity of the judicial process by preventing the government from benefiting from the misconduct of its agents. To permit the use of illegally obtained evidence in court would signal an implicit approval of the officers' methods in obtaining the evidence. This would send the message that it is acceptable to violate constitutional rights for a good cause. But the exclusion of such evidence sends a different message: The government must respect rights even as it pursues its legitimate ends.

The Case Against the Exclusionary Rule Critics of the exclusionary rule respond that it leads to the release of dangerous criminals. Under the exclusionary rule, the reliability of the illegally obtained evidence has no effect on its admissibility. If a suspect under torture confesses to a crime, there may be reason to doubt the truth of his statements. But if a police officer discovers a stolen wallet during an illegal search of a suspect, the wallet provides clear evidence of guilt. Yet in neither case is the evidence admissible. This holds true no matter how serious the charges against a defendant. Even if the illegally seized evidence conclusively proves that the defendant is guilty of murder, it cannot be used to convict him. If there is no other evidence adequate to obtain a conviction, the defendant is released. For opponents of the exclusionary rule, this is too high a price to pay. They insist that all pertinent and reliable evidence should be admitted at trial so that guilty persons receive their just punishment.

Critics also charge that the exclusionary rule is too inflexible. In determining the admissibility of evidence, the rule does not consider how seriously the defendant's rights were infringed upon in obtaining that evidence. The same penalty of exclusion operates whether the police officer's violation of the defendant's rights was slight and inadvertent or blatant and intentional. In the words of Justice Benjamin Cardozo, this may mean that "the criminal is to go free because the constable blundered."[40] Some critics have proposed a "good faith" exception to the rule, permitting the introduction of evidence resulting from illegal searches or interrogations that officers believed were lawful. This would preserve the rule only for intentional, and hence serious, violations of constitutional rights.

Critics also contend that the exclusionary rule may be ineffective in protecting rights, because it can deter police misconduct only if police engage in illegal searches in order to secure evidence for trial. It has no effect on illegal searches undertaken for other reasons—to harass individuals or to confiscate contraband, for example. Even when police search to gather evidence, the exclusionary rule can deter misconduct only if the offending officers realize that they are violating Fourth Amendment rights. An officer who mistakenly believes a search is permissible under the Fourth Amendment will not be deterred by the exclusionary rule.

Finally, critics assert that the exclusionary rule protects only criminals, not law-abiding citizens. If police illegally ransack a person's house and find evidence of criminality, that evidence is excluded at trial. But if they discover no evidence of crime, there is no evidence to exclude and no trial at which to exclude it, so the exclusionary rule does not help the victim of the illegal search. Opponents of the exclusionary rule propose replacing it with other mechanisms, such as civil suits against police by victims of illegal searches or interrogations.

Evidence on the Exclusionary Rule

Does the Exclusionary Rule Deter Police Misconduct? If the exclusionary rule has a deterrent effect, then one would have expected illegal police searches to decline after *Mapp*. In a few jurisdictions, researchers did find a decrease in the number of defense motions to suppress illegally seized evidence, which might signal a decline in illegal searches. In several jurisdictions after *Mapp*, however, there was an increase in the number of motions to suppress illegally seized evidence. One might attribute this increase to the failure of the exclusionary rule to deter police misconduct. But the increase might indicate a greater willingness on the part of defense attorneys to challenge police searches so that illegally seized evidence would be excluded at trial. Thus, the available evidence does not conclusively resolve the deterrence issue.[41]

How Does the Exclusionary Rule Affect Convictions? Critics contend that many guilty people go free because of the exclusionary rule, but empirical studies do not bear this out. A National Institute of Justice study of prosecutions in California found that prosecutors decided not to press charges because of illegal search problems in 2.4 percent of drug cases and in fewer than 1 percent of their cases overall.[42] A nine-county study of criminal courts found that defense attorneys filed motions to suppress evidence in more than 7 percent of all cases but that only 5 percent of those motions succeeded (with a slightly higher success rate in drugs and weapons cases). The study also found that defendants were convicted in one-third of those cases in which evidence was suppressed.[43] Thus, few defendants escape conviction because of the exclusionary rule.

Does the Exclusionary Rule Let Dangerous Criminals Go Free? Even if few defendants avoid conviction as a result of the exclusionary rule, those defendants who do may pose a serious threat to public safety. In general, however, studies of the exclusionary rule do not support this. For example, a study found that almost 60 percent of the cases "lost" as a result of the exclusionary rule involved so-called victimless crimes (drug possession or weapons possession), while fewer than 20 percent involved serious offenses such as armed robbery and burglary. Also, if the defendants in the "lost" cases had been convicted and had received sentences comparable to those given to defendants convicted of the same offenses, almost two-thirds would have received jail sentences of less than six months.[44] These findings suggest few dangerous criminals are freed by the exclusionary rule. Of course, they do not determine whether the release of even a few such criminals is too heavy a price to pay for the exclusionary rule.

Are There Alternatives to the Exclusionary Rule? Critics concede that if the exclusionary rule is eliminated, other means must be devised to vindicate constitutional rights and prevent police misconduct. Two proposed alternatives are the "good faith" exception to the exclusionary rule and a reliance on civil suits against those who violate constitutional rights.

The idea of a good faith exception was recommended by the Attorney General's Task Force on Violent Crime in 1981 and has over time been endorsed in Supreme Court rulings. Under this proposal, illegally obtained evidence can be used at trial only if the officers who obtained it acted in good faith—that is, with a reasonable belief that they were complying with constitutional requirements.[45] Proponents note that the good faith exception retains the exclusionary rule when it might serve as a deterrent but not when the problem is a lack of knowledge about constitutional requirements, not an unwillingness to observe them. Initially narrow in scope, this exception was expanded in *Heien v. North Carolina* (2014) to include unintentionally illegal searches by police officers based on their misunderstanding of the requirements of the Fourth Amendment.[46] The dissenting justices in *Heien* charged that the exception had in effect swallowed up the rule. What is unclear is how frequently constitutional violations by the police result from good faith mistakes rather than intentional disregard of constitutional mandates.

Those who favor abolishing the exclusionary rule have also proposed that the United States emulate Great Britain in permitting civil suits against police officers by those whose constitutional rights have been violated.[47] This would not only ensure the availability of all reliable evidence in criminal cases but also offer recourse for innocent victims of illegal searches. Yet, proponents of the exclusionary rule caution that juries may sympathize with police officers and be reluctant to decide in favor of disreputable plaintiffs, especially those who had committed criminal offenses. The lack of success of civil suits against police offers at least some support for this contention.[48]

THE INSANITY DEFENSE

In 1981, John Hinckley, Jr. fired six shots at President Ronald Reagan. One hit the president in the chest, two wounded members of his security detail, and a fourth penetrated the brain of Press Secretary James Brady, permanently disabling him. A year later, a jury found Hinckley not guilty by reason of insanity, concluding that the government had failed to prove beyond a reasonable doubt that Hinckley was sane at the time of the shooting. The public was outraged. Some people, thinking that Hinckley had hoodwinked the jury, proposed tightening the legal definition of insanity. Others, including Attorney General William French Smith, demanded abolition of the insanity defense.

The reaction to the Hinckley verdict was reminiscent of an earlier controversy in England over the insanity defense, after a court acquitted by reason of insanity Daniel M'Naghten, who—under the delusion that he was being persecuted by the Pope, the Jesuits, and Prime Minister Robert Peel—mistakenly shot Peel's secretary. This case announced the influential M'Naghten test for determining whether defendants were responsible for their criminal actions.

Tests of Insanity

The criminal law justifies holding persons responsible for their actions on the assumption that they are able to choose between acceptable and unacceptable behavior. This assumption in turn supplies the rationale for the insanity defense: the law should not punish those who cannot choose between acceptable and unacceptable behavior. But how does one define the inability to choose that exempts a person from the operation of the criminal law? Under the M'Naghten test, a defendant is responsible for criminal actions unless "the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, he did not know he was doing what was wrong."[49] Thus, the incapacity must come from mental disease; incapacity due to drunkenness or drug use does not excuse criminal conduct. What is distinctive about the M'Naghten test is its emphasis on the cognitive capacity of defendants—that is, their ability to distinguish right from wrong. Lack of understanding, not an inability to control one's behavior, is decisive.

Efforts to reform the insanity defense initially focused on introducing a volitional element into the legal definition of insanity (see Table 6.2).

TABLE 6.2 Insanity Defense Standards

American Law Institute	M'Naghten Rule	M'Naghten Rule and Irresistible Impulse	Guilty but Mentally Ill
Arkansas	Alabama	Colorado	Alaska
Connecticut	Alaska	New Hampshire	Arizona
Delaware	Arizona	New Mexico	Connecticut
Hawaii	California	New York	Delaware
Illinois	Florida	Virginia	Georgia
Indiana	Georgia		Idaho
Kentucky	Iowa		Illinois
Maine	Louisiana		Indiana
Maryland	Minnesota		Kentucky
Massachusetts	Mississippi		New Mexico
Michigan	Nebraska		Pennsylvania
North Dakota	Nevada		South Dakota
Oregon	New Jersey		Utah
Rhode Island	North Carolina		
Tennessee	Ohio		
Vermont	Oklahoma		
West Virginia	Pennsylvania		
Wisconsin	South Carolina		
Wyoming	South Dakota		
	Washington		

Defendants would be judged insane not only if they lacked the capacity to distinguish right from wrong but also if mental illness prevented them from choosing acceptable behavior. This is reflected in the "irresistible impulse" test, which some states adopted as a supplement to the M'Naghten test.

The irresistible impulse test permits the acquittal of defendants who could not control their behavior, even though they knew it was wrong. It is also reflected in the American Law Institute's (ALI) Model Penal Code, which served as the basis for reform in several states. According to the ALI's code, "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."[50] The ALI standard differs from the M'Naghten test in including both cognitive and volitional elements and, it seems, in using "appreciate" rather than "know," to allow consideration of whether defendants were emotionally as well as intellectually aware of the significance of their behavior.

Following the verdict in the Hinckley case, however, reform efforts took a decidedly different turn. In the Comprehensive Crime Control Act of 1984, Congress shifted the burden of proof on insanity, requiring the defense to prove that the accused was insane at the time of the crime instead of the government having to prove he was not. The Act also narrowed the legal definition of insanity by resurrecting the M'Naghten standard for federal prosecutions. Several states also tightened their requirements for insanity acquittals and for the release of offenders acquitted by reason of insanity. Indeed, Idaho, Kansas, Montana, and Utah abolished the insanity defense altogether. Finally, 11 states followed the example of Michigan, which in 1975 sought to reduce use of the insanity defense by establishing the verdict of "guilty but mentally ill."[51]

The Effects of the Insanity Defense

Relatively few defendants plead not guilty by reason of insanity (NGRI), and even fewer are acquitted on that basis. For example, a New Jersey study found successful NGRI pleas in far fewer than 1 percent of all criminal cases. But researchers have found that the test used for determining insanity affects both the frequency of insanity pleas and their success, so apparently jurors do attempt to apply the standard outlined by judges in their instructions to the jury. Perhaps surprisingly, establishment of the "guilty but mentally ill" verdict has not decreased NGRI pleas or acquittals, as it appears that those defendants in Michigan who pled guilty but mentally ill would have pled guilty in the absence of that alternative verdict.[52]

Many states commit defendants found not guilty by reason of insanity to a 50-day observation period before determining whether they can be released. Few are released at the conclusion of that period. In comparison with those convicted and sentenced, insanity acquittees tend to spend an equivalent time in confinement for violent crimes, such as murder or attempted murder, and more time in confinement for less serious crimes.[53] For example, John Hinckley shot President Reagan in 1981 but was not released from confinement until 2022. Thus, defendants seldom benefit if found not guilty by reason of insanity.

CRIME AND PUNISHMENT: SENTENCING

From the late 1940s to the early 1970s, the idea of rehabilitation dominated the sentencing of criminals in the United States. It was assumed that the aim of imprisonment was to change the character, attitudes, and behavior of offenders, both to benefit them and to make them less threatening to society.[54] Punishment was to be tailored to the offender, with the length of confinement depending less on the character of the offense and more on how long it took to rehabilitate the offender. To fit the punishment to the offender, sentencing policy emphasized the use of indeterminate sentences as well as broad discretion for judges in sentencing. Prisoners were sentenced for a range of years, and the prison parole board released offenders when they demonstrated sufficient signs of rehabilitation. California, the state most committed to the rehabilitative model, sentenced most serious offenders to an indeterminate term of between one year and life in prison, with the duration served determined by parole authorities.

Beginning in the early 1970s, this emphasis on rehabilitation came under attack. Conservatives charged that it promoted excessive leniency in sentencing and that punishment should serve the purposes of retribution and incapacitation rather than rehabilitation. Liberals attacked the potential for unfairness and discrimination in a system under which offenders committing the same crime could serve widely disparate sentences, especially when those deciding sentences (judges and parole boards) did not have to explain or justify their choices. Social science research also undermined the case for rehabilitation, demonstrating that imprisonment rarely promoted rehabilitation and that, even when it did, officials could not reliably determine which offenders had been rehabilitated.[55]

Reforming Sentencing

These criticisms led to reforms designed to curb excessive leniency in sentencing and to eliminate sentencing disparities. One such reform was the establishment of "mandatory minimum" sentences for certain offenses.[56] Massachusetts, for example, established a one-year minimum sentence for anyone convicted of carrying a firearm in violation of the state's firearm laws. Michigan prescribed a two-year prison sentence, in addition to the primary sentence, for possession of a firearm during the commission of a felony (as publicized on billboards, "One with a Gun Gets You Two").

A second approach was to target repeat offenders, using "three-strikes" laws that mandate lengthy terms of imprisonment for third-time felons. In 1993, Washington became the first state to enact a three-strikes law; and by 2004, 26 states and the federal government had followed suit. In *Ewing v. California* (2003), the Supreme Court ruled that California's three-strikes law, under which defendants convicted of a felony who had previously been convicted of two or more serious or violent felonies must serve at least 25 years before being eligible for parole, did not violate the constitutional ban on "cruel and unusual punishments."[57]

A third reform has been to limit judicial discretion by establishing guidelines for judges to use in sentencing offenders. Some states—Florida and Maryland, for example—adopted guidelines that judges might voluntarily adhere to in sentencing. Others such as California enacted specific sentences for various offenses, allowing judges to increase or decrease the prescribed sentence only slightly, based on mitigating or aggravating factors. In the Sentencing Reform Act of 1984, Congress adopted a third approach, delegating to a commission the responsibility for devising detailed sentencing criteria for federal courts. Under the commission's guidelines, offenders were assigned a score based on the seriousness of the offense and personal characteristics such as age, mental condition, and prior record. For each combination of offense and offender scores, a presumptive sentence was established. Federal judges were obliged to justify any sentences outside the guidelines, and both the defendant and prosecutor could appeal the justification offered by the judge.

In *Blakely v. Washington* (2004), the U.S. Supreme Court cast a shadow on the federal sentencing guidelines and on similar guidelines in other states. Citing defendants' Sixth Amendment right to trial by jury, the Court ruled that any aggravating factors used to increase a criminal sentence must be proven to a jury, not decided by a judge. Although the Court did not directly address the federal guidelines, those guidelines authorized the trial judge to determine whether aggravating factors existed and to adjust the defendant's sentence accordingly. In *United States v. Booker* (2005), the Court ruled the congressional statute making the federal sentencing guidelines mandatory was unconstitutional. Thus, *Booker* made the guidelines essentially advisory, but federal judges were still obliged to consider them in sentencing, and Congress could consider alternative approaches to curtailing the sentencing discretion of federal judges.[58]

The Effects of Sentencing Reforms

Early studies of the gun laws in Massachusetts and Michigan suggested that the establishment of mandatory sentences did not guarantee greater severity for offenders, nor did it eliminate disparities in sentencing.[59] Prosecutors circumvented the laws when they believed them to be unduly harsh, often with the approval of judges and police, usually by refusing to charge arrestees with offenses that carried a mandatory sentence. After the adoption of Michigan's gun law, parole officers routinely began parole hearings with the comment, "I see you were convicted of unarmed robbery in Detroit. What caliber of gun did you use?"[60] Also, defendants charged with crimes carrying a mandatory sentence went to trial more frequently, thus slowing the processing of cases. Those convicted under mandatory-sentence statutes have received more severe sentences. Mandatory-sentence laws nonetheless increased sentencing disparities among offenders committing the same crime because the sentence such offenders received depended on whether the prosecutor charged them with violating the mandatory-sentence law.

Proponents and opponents of three-strikes laws disagree about their effects.[61] Proponents contend that recidivist offenders are responsible for much of serious crime. Three-strikes laws, they argue, prevent habitual offenders from committing further crimes by removing them from circulation and putting them in prison for extended periods. In addition, these laws deter crime in that the threat of long imprisonment discourages criminal activity by those who have previously been convicted of crimes. Proponents point to the experience of California, which adopted a three-strikes law in 1994, as proof for their claims. From 1992 to 2002, the murder rate in California declined 45 percent, and the overall rate of violent crimes fell 46 percent. Undoubtedly, imprisoning large numbers of people for extended periods is expensive, but proponents insist that the economic and other costs of crime are even higher.

Critics of three-strikes laws are unpersuaded. The California data, they argue, show that the decline in serious crime began before the enactment and implementation of three-strikes laws, so they conclude that it resulted largely from factors other than the three-strikes law. More generally, they question whether the three-strikes law produces justice in sentencing. For one thing, offenders who commit the same offense will receive vastly different sentences, depending upon whether or not they have two previous convictions; for example, a person who committed a second-degree burglary would ordinarily receive a one-year sentence, whereas someone who had two previous convictions and committed the same crime would receive a 25-year sentence. For another thing, offenders committing less serious crimes would receive the same sentence as those committing more serious crimes—for example, a robber who committed his third offense would receive the same sentence as a rapist with two prior convictions.

Sentencing guidelines seemed a more promising approach to sentencing reform.[62] In Minnesota and some other states, these guidelines succeeded in reducing unjust (e.g., racially discriminatory) sentencing disparities by eliminating the discretion of judges and parole boards to determine the length of imprisonment. However, the federal sentencing guidelines were subject to intense criticism. Although one aim of the guidelines was to increase the severity of sentences, some critics insist that the guidelines treat offenders too harshly. Far fewer offenders receive probation under the guidelines, and the average prison time for offenses increases dramatically. For example, the term served for drug offenses rose from 22 months before the guidelines to 65 months after, and the time for robbery increased from 52 to 91 months.[63]

Critics also charged that the guidelines have made sentencing too rigid, preventing judges from considering the personal characteristics of individual defendants, which led to arbitrary and unjust results. Indeed, one federal judge complained his role had been reduced to that of a notary public; another compared his role to that of an accountant.[64] Finally, critics contend that the sentencing guidelines give too much power to prosecutors. Kate Stith and José Cabranes observed: “Because the sentencing rules are known in advance, prosecutors may greatly influence the ultimate sentence through their decisions on charges, plea agreements, and motions to depart [from the prescribed sentence] for substantial assistance to law enforcement authorities.”[65] In sum, critics of sentencing guidelines deny that the elimination of judicial discretion promoted justice in sentencing.

CRIME AND PUNISHMENT: DRUG COURTS

The spread of cocaine and crack cocaine during the 1980s sparked concern about the drug problem in the United States.[66] The federal government responded by launching a “war on drugs,” devoting substantial resources to drug interdiction and to the arrest of drug users and traffickers. Congress enacted laws that increased penalties for drug trafficking and drug use, and state legislatures followed suit, prescribing mandatory minimum sentences for drug offenders. The war on drugs produced a dramatic rise in drug arrests—up 134 percent nationally from

1980 to 1989. But prosecution of these offenders also imposed serious caseload pressures on state and federal courts

By 2002, convictions for drug trafficking and drug possession constituted almost one-third of felony convictions in state courts. This in turn led to increased demands on state and federal prisons. By 2004, 25 percent of state prisoners were drug offenders. But harsh sentences did not stem the tide of drug offenses, and the high recidivism rate among drug offenders led many officials to conclude that the existing approach to the drug problem was not working. As Judge Diane Strickland of Virginia stated:

> Basically, we have had a revolving door phenomenon where we take an offender, lock him up for whatever appropriate period of time, and have him back out in the community without addressing the underlying source of his criminal behavior ... We have to come up with something else that we can do for these folks if we're going to try and deter their criminal behavior.[67]

The drug-court movement emerged out of dissatisfaction with prevailing approaches to drug crime. The first drug court was established in 1989 in Dade County (Miami), Florida, an area plagued by drug crime. Among those spearheading this initiative was Janet Reno, Florida's state attorney at that time. After President Bill Clinton appointed Reno as attorney general, the Department of Justice—with strong bipartisan support in Congress—encouraged the establishment of drug courts throughout the nation. Today, more than 2200 drug courts are in operation. Indeed, some proponents of the drug-court concept, such as Chief Judge Judith Kaye of New York, have recommended extending the approach pioneered in drug courts throughout state court systems.[68]

What Is Distinctive About Drug Courts?

Drug courts are distinctive both in their aims and in the means by which they seek to achieve those aims. Drug courts incorporate individualized treatment for substance abuse directly into the judicial process. Offenders typically enter the drug court program before trial, often almost immediately after arrest. They are assigned to a drug treatment program and told when to meet with the judge, who will monitor their progress. Court appearances can occur as often as several times a week or as infrequently as once a month. Offenders undergo drug testing on a regular basis, and positive test results or missed treatments or court appearances can result in immediate sanctions; one drug-court judge referred to the jail as "my motel." But the focus of the drug court is less on determining guilt or dispensing punishment than on curing offenders of their substance dependency and reorienting their lives. This ambitious goal may keep offenders under court supervision for an extended period. To graduate from Delaware's drug court, for example, an offender must have four months of total abstinence, hold a steady job, maintain a stable residence, participate in 12-step meetings, have developed a support network, and have successfully completed a drug treatment program.

Underlying the drug courts' program of continuing supervision and treatment is the notion of "therapeutic justice." Traditionally, doing justice entailed determining in an adversarial proceeding whether or not defendants were guilty and, if they were, prescribing appropriate punishments. However, in drug courts "the way [justice is] redefined is … you have people who have a disease called alcoholism and/or addiction. And what is just is getting them well rather than punishing them for their disease."[69] This redefinition of justice has consequences. Gone is the emphasis on guilt or innocence: the "focus is on the participant's recovery and law-abiding behavior—not on the merits of the pending case."[70] Gone, too, is the adversarial character of the process, because all courtroom participants are expected to collaborate as a team in a treatment regimen for the drug court's "client." This of course requires a change in orientation and responsibilities, particularly for defense attorneys. Gone, too, is the emphasis on the presumption of innocence and various trial rights; in drug court, offenders must forego their right to a speedy trial, admit their drug use rather than proclaim their innocence, and submit to regular drug testing so that their progress can be monitored. Also gone is the aim of assigning a punishment commensurate with the offense; instead, the aim is to redirect the offender's life. The supervision of offenders by the drug court continues until they have successfully completed their treatment programs. Finally, gone is the role of the judge as impartial arbiter. Instead, judges have broad and ongoing interaction with offenders that may extend to oversight over various aspects of the offenders' lives (see Box 6.2).

Evaluating Drug Courts

According to their advocates, drug courts rehabilitate participants and reduce recidivism among drug offenders, thus reducing court caseloads and providing a cost-effective alternative to incarceration. Some studies have reported dramatic decreases in recidivism, and the most comprehensive review of research on drug courts concluded that drug use and other criminal behavior were substantially reduced while offenders were under the intense supervision of the drug court. The study also found that graduates of drug courts tended to have lower recidivism rates than those who did not participate in the program, although the reduction in recidivism from participation was not dramatic. Furthermore, the

Box 6.2 Scenes from Drug Courts

According to Judge Peggy Hora of the Hayward (California) drug court, "We are the judges that get to color outside the lines. The way we relate to the people in drug court is totally different from the traditional jurisprudential role." A few snapshots of what transpires in drug courts shows the difference:

- Judge Hora presenting a drug-court participant with a graduation balloon to celebrate the participant passing her GED test.
- Judge Stephanie Duncan-Peters of the Washington, D.C., drug court, roaming her courtroom, microphone in hand, engaging individual offenders about their progress since their last appearance in court.
- Judge Stanley Goldstein of the Miami drug court, addressing a drug court participant who had relapsed and used drugs: "Any problem you got, you come to me. I'm your daddy."
- Judge Robert Fogan of the Fort Lauderdale drug court, giving offenders a certificate, a T-shirt, and a hug when they graduate from the court's treatment program.

SOURCE: James L. Nolan, Jr., *Reinventing Justice: The American Drug Court Movement* (Princeton, NJ: Princeton University Press, 2001), pp. 5–11, 102, 191.

savings stemming from diverting drug offenders from prison have been substantial; studies in California, for example, estimated that the state saved millions annually through their drug courts. These results have shifted the question from whether to institute drug courts to how to run them effectively.[71]

Yet not everyone supports the concept. Some critics view the drug court's departures from the traditional judicial process as deeply problematic.[72] They charge that the language of treatment disguises how punitive drug courts actually are. Drug-court judges exercise broad discretion over offenders without significant checks on their authority; thus, judges can impose jail time for drug relapses and determine how long offenders remain under court supervision. For example, those guilty of drug possession typically spend far longer under judicial supervision than they would have spent in jail if convicted. Moreover, those who fail the drug-court program remain subject to prosecution for their original offenses.

Critics also contend that drug courts augment the reach of government power. For one thing, some minor offenders whose cases would not be prosecuted are referred to the drug court. As Judge Morris Hoffman of the Denver criminal court observed: "The very presence of the drug court, with its significantly increased capacity for processing cases, has caused the police to make arrests in, and prosecutors to file, the kinds of ten- and twenty-dollar hand-to-hand drug cases which the system would not have bothered with before."[73] For another thing, offenders in drug courts lack the safeguards that come from limited judicial authority, adversarial proceedings, and vigorous representation by counsel. Most important, whereas the aim of criminal law is limited, determining guilt or innocence and imposing appropriate punishment, the aim of the drug court is comprehensive, changing fundamentally the lifestyle of the drug user.

CRIME AND PUNISHMENT: CAPITAL PUNISHMENT

On May 1, 2012, Michael Selsor was executed for the murder of convenience store clerk Clayton Chandler. Selsor's case illustrates key features of the death penalty in the United States. First, Selsor was convicted in an Oklahoma trial court under state law—of the 1295 executions from 1976 to Selsor's execution, only three were by the federal government.

States vary considerably as to whether and how often they impose the death penalty: Oklahoma has the country's highest per-capita execution rate, and Southern states account for more than 80 percent of all executions (see Table 6.2). Second, Selsor was executed for murder. The U.S. Supreme Court has ruled that capital punishment for crimes such as rape or child rape violates the constitutional ban on cruel and unusual punishment (see Table 6.3). Third, Selsor's victim was white. Although roughly equal numbers of whites and African Americans are

TABLE 6.3 The Death Penalty in the United States (1977–2022)

Death Penalty Used	Death Penalty Seldom Used	Death Penalty Abolished
Texas (570), Virginia (113), Oklahoma (112), Florida (99), Missouri (90), Georgia (76), Alabama (67), Ohio (56), North Carolina (43), South Carolina (43), Arizona (37), Arkansas (31), Louisiana (28), Mississippi (21), Indiana (20), California (13), Nevada (12), Tennessee (13), Utah (7), Washington (5)	Idaho (3), Kentucky (3), Montana (3), Nebraska (3), Pennsylvania (3), South Dakota (3), Oregon (2), Wyoming (1)	Alaska (1957), Colorado (2019), Connecticut (2012), Delaware (2016), Hawaii (1957), Illinois (2011), Iowa (1965), Maine (1887), Maryland (2013), Massachusetts (1984), Michigan (1846), Minnesota (1911), New Jersey (2007), New Mexico (2009), New York (2004), North Dakota (1973), Rhode Island (1984), Vermont (1964), West Virginia (1965), Wisconsin (1853)

homicide victims, 76 percent of those executed since 1976 have had white victims. Finally, Selsor was executed after spending 36 years on death row. Although the length of his confinement was unusual, long delays between sentencing and execution are not: For those executed in 2010, for example, the average time between sentencing and execution was 178 months.[74]

Many countries have abolished capital punishment—in Europe, only Belarus retains the death penalty—and since 2007, Connecticut, Delaware, Illinois, New Jersey, New Mexico, and New York have all eliminated it. But many states continue to sentence criminals to death—as of 2023, more than 2400 persons were on death row. Let us look at capital punishment in the United States.

The Transformation of Capital Punishment

States with capital punishment rely on the jury to determine when to impose it. For most of American history, when a defendant was charged with a capital crime, the jury simultaneously rendered its verdict (guilty or not guilty) and determined the punishment. Whether a person was sentenced to death, therefore, depended on the unfettered judgment of the jury, and that judgment could be distorted by bias or passion. For example, in the 100 years following the Civil War, "every single execution for a nonlethal crime in Mississippi—thirty-three for rape and eight for armed robbery—involved an African American defendant and a white victim."[75]

However, in *Furman v. Georgia* (1972), the Supreme Court by a 5–4 vote struck down the existing death-penalty statutes as unconstitutional, ruling that they gave juries too little guidance and too much discretion in deciding whether to impose the death penalty. Although each member of the Court majority wrote a separate opinion, they shared a concern about the potential for jury arbitrariness. As Justice Potter Stewart put it:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. [The Constitution] cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.[76]

Several justices also worried that race or class bias might infect jury deliberations.

Furman invalidated all of the nation's existing death penalty statutes and released 589 prisoners from death row. But it did not outlaw capital punishment; and within two years, 35 states and the federal government had enacted new death-penalty statutes, which sought to eliminate the unlimited jury discretion condemned in *Furman* either by imposing mandatory death sentences for certain crimes or by establishing standards to guide juries in imposing sentence. In *Woodson v. North Carolina* (1976), the Supreme Court invalidated the former approach. But in *Gregg v. Georgia* (1976), it upheld a Georgia statute that established a two-stage trial in capital cases; and in the wake of *Gregg*, all death-penalty states have adopted this bifurcated-trial approach.[77]

During the first stage of the bifurcated trial, the prosecution and defense present evidence, and the jury determines the guilt or innocence of the accused. Should the defendant be found guilty, during the second stage of the trial, the prosecution presents testimony and other evidence as to aggravating factors that make the crime more serious and hence more deserving of the death penalty. The defense attorney counters with evidence as to mitigating factors that make the crime less serious or the defendant less blameworthy, so that the death penalty should not be imposed. To guide juries in determining the appropriate penalty, states have devised lists of aggravating and mitigating factors that jurors are obliged to consider before imposing sentence. Aggravating factors might include whether the defendant had a previous criminal record, had killed a police officer or other public official, had committed the crime for money, or had committed a murder that was "outrageously or wantonly vile, in that it involved torture, depravity of mind, or an aggravated battery to the victim." Mitigating factors might include the absence of a criminal record, the youth or mental incapacity of the defendant, or the fact that "the defendant acted under extreme duress or under the substantial domination of another person." The jury is instructed to weigh the aggravating and mitigating factors before imposing sentence.[78]

The Death Penalty after *Furman*

Since *Furman*, opponents of the death penalty have pursued three litigation strategies. First, they have sought to prove that the new state statutes did not eliminate jury arbitrariness and racial discrimination in sentencing. The key challenge was in *McCleskey v. Kemp*, in which defense attorneys submitted a social science study that claimed that when one controlled for the legally permissible factors that led to a death sentence, the odds of a death sentence for those who killed white victims in Georgia were on average 4.3 times higher than for those who killed nonwhite victims.[79] However, the Court, by a 5–4 vote, rejected the challenge

TABLE 6.4 Major Supreme Court Rulings on Capital Punishment

Case	Holding
Furman v. Georgia (1972)	The system by which states determined who received the death penalty was arbitrary and capricious, violating the ban on cruel and unusual punishments.
Gregg v. Georgia (1976)	The death penalty is not inherently cruel and unusual punishment; a bifurcated trial for determining punishment meets constitutional requirements.
Coker v. Georgia (1977); *Kennedy v. Louisiana* (2008)	The death penalty cannot be imposed for non-homicide crimes, such as the rape of an adult or a child.
McCleskey v. Kemp (1987)	A defendant must show racial discrimination in his own case in order to claim a constitutional violation; showing a pattern of racial discrimination in the imposition of death sentences is not enough.
Atkins v. Virginia (2002)	The death penalty cannot be imposed on the mentally retarded.
Roper v. Simmons (2005)	The death penalty cannot be imposed on those under the age of 18 at the time they committed a crime.
Baze v. Rees (2008)	Lethal injection is a legitimate method of execution.

and upheld the death sentence. Even if the study were persuasive, the Court majority insisted, McCleskey had to prove that the prosecutor and jury in his case had acted with discriminatory purpose, and this he was unable to do. However, concerns about arbitrariness and discrimination continued, as evidenced by the American Bar Association's adoption of a resolution in 1997 calling for a nationwide moratorium on the death penalty pending a scientific investigation of the fairness and impartiality of the capital justice process.

Second, defense attorneys have challenged the reach of state death-penalty statutes, focusing on who might be executed, and on this they have enjoyed considerable success. As Table 6.4 indicates, the Supreme Court has prohibited the execution of mentally retarded persons, those under the age of 18 at the time of their crime, and those who committed crimes other than murder.

Third, defense attorneys have attempted to overturn convictions or to delay executions through drawn-out appeals. Following conviction in a capital case, defendants typically appeal to the state intermediate court of appeals, the state supreme court, and then the U.S.

Supreme Court. Should they not prevail in these venues, they may mount challenges in federal court via federal habeas corpus review (which considers whether the defendant's rights were violated at trial), with the potential for appeals of federal district court rulings to federal courts of appeals and again to the U.S. Supreme Court. The failure of one habeas corpus petition need not end matters, as defense counsel can file further petitions, thereby extending the process. As former Chief Justice William Rehnquist complained, despite jury determinations that the death penalty was warranted, "virtually nothing happens except endlessly drawn out legal proceedings."[80] In response, defense attorneys point to the high percentage of capital sentences reversed prior to execution. In the Antiterrorism and Effective Death Penalty Act of 1996, Congress attempted to curtail repetitive habeas corpus proceedings in federal courts, but the time between conviction and execution has nonetheless continued to lengthen.

The Death Penalty: Pro and Con Those who favor capital punishment believe that it "expresses the community's moral sensibility" and that retribution is the only morally appropriate penalty for murder.[81] They further insist that because death is the most feared punishment, the prospect of the death penalty deters potential offenders and so saves lives. In addition, because those who kill have forfeited their right to life, the community should not bear the cost of imprisoning them for the rest of their lives. Finally, capital punishment ensures that those who have committed murder will never do so again.

Opponents of the death penalty dismiss it as morally unacceptable, a relic of a more barbaric past. They claim that few murderers consider the punishment they might receive before committing their crimes, so capital punishment cannot deter. Insofar as it does, they insist, life imprisonment is an equally effective deterrent. Opponents emphasize the irreversibility of capital punishment, noting that mistakes may lead to the execution of innocent people. They also contend that class and racial bias distort the process under which death sentences are imposed, arguing that wealthy defendants are far more likely to be well represented during trials and appeals.

Evaluating the Arguments Scholars have long investigated the effects of the death penalty. Early research found the death penalty had no greater deterrent effect than life imprisonment did, but more recent research has reached conflicting conclusions on deterrence. Some scholars have found that murder rates tend to fall as executions rise, and one study suggested that extending the death penalty to child murders substantially reduced such killings. Others, however, insist that the death penalty is applied so rarely that it is impossible to determine what causes year-to-year changes in the homicide rate, and so there is no reliable statistical evidence that the death penalty deters offenders.[82]

Studies of costs associated with life imprisonment versus the death penalty have found, perhaps surprisingly, that the latter is far more costly. Reasons for this include the greater cost of death-penalty trials, of appeals and habeas corpus proceedings in capital cases, of imprisonment on death row, and of the execution itself. Thus, one study found that since the reintroduction of the death penalty in California in 1978, the state had spent about $4 billion for a death-penalty system that had executed only 13 offenders.[83] A study in Maryland found that each case in which a death sentence was imposed cost the state $1.9 million more than murder cases in which the death penalty was not sought.[84]

Several studies have shown that many capital sentences are reversed prior to execution—as Justice John Paul Stevens observed, "The reversible error in capital trials is staggering."[85] In part, this has to do with the quality of legal representation in capital cases. Some states have capital defender offices where attorneys specialize in death-penalty cases, but many do not, including several Southern states that send many offenders to death row. Beyond the question of legal errors, there is evidence that innocent persons have been condemned and sometimes executed. Since 1976, more than 160 people have been exonerated and freed from death row. The concern has led to action in some states. In Illinois, following the exoneration of a condemned man two days before his scheduled execution, Governor George Ryan declared a moratorium on executions; and two days before leaving office in 2003, he declared that the death penalty in Illinois was "fraught with error" and commuted the sentences of all 167 death row inmates to "life" terms. In Texas, a 2012 report that an innocent man may have been executed led former Governor Mark White to call for reform of criminal investigations and trials in the state, urging that "if we are going to continue to execute individuals, we must be absolutely certain of those individuals' guilt." However, proponents of the death penalty view these exonerations differently, arguing that the detection of errors in these cases shows that the system works, detecting problems before offenders are executed.[86]

CONCLUSIONS

Although the federal Bill of Rights imposes basic requirements for the administration of justice in the United States, the primary responsibility rests with state and local governments. This decentralization of authority has encouraged the development of a diversity of institutions, laws, and practices for dealing with criminal justice issues. This diversity is reflected in the legal standards defining criminal justice policy—from the rules regulating pretrial release to the tests for determining responsibility for one's criminal acts and the laws governing the sentencing of criminals. If anything, there is even greater diversity in the discretionary practices—such as prosecutorial dismissal of charges and plea bargaining—that have developed in the absence of legal standards or, at times, in opposition to them. This diversity suggests that it is probably inaccurate to speak of the American criminal justice system. There are almost as many systems as there are states and localities.

Yet states and localities do confront common policy problems. For example, both Supreme Court rulings and fundamental fairness demand that indigent defendants be represented by counsel. The policy question is whether to opt for a public defender program, an assigned counsel system, or some other alternative. Similarly, some mechanism must be devised for distinguishing between cases that merit prosecution and cases that do not. The policy question here is whether this judgment should rest with the prosecutor, the judge at the preliminary hearing, or some other official.

Although some issues in the administration of criminal justice do not excite great controversy, others—including some involving the courts—generate intense conflict. Often these conflicts have pitted defenders of court practices against political conservatives, who charge that American courts have undermined public safety by showing excessive concern for the rights of criminals and by treating them too leniently. Since the 1970s, conservatives have won a number of victories in their campaign to reduce the discretion of judges and mandate harsher treatment for offenders. For example, in some jurisdictions, defendants may now be held in "preventive detention" pending trial; may have illegally seized evidence used against them, if it was seized in good faith; may find it more difficult to mount an insanity defense; and may face a mandatory or determinate sentence upon conviction.

The conflict involves not only the substance of policy but also who sets it. Legislators have enacted statutes on several matters, from pretrial release to sentencing, in an effort to reassert control over criminal justice policy. On occasion, executive officials also have sought to determine basic policy. The ban on plea bargaining by Alaska's attorney general is one example. Judges and prosecutors often oppose these efforts, viewing them as infringements on their prerogatives or as upsetting established modes of operation. At times the opposition has been direct, as when prosecutors and judges in Michigan effectively gutted the state's mandatory-sentencing law. More frequently, judges and prosecutors have sought to exercise discretion to achieve what they view as desirable outcomes despite the new requirements.

Whether justice is better promoted by the faithful application of legal standards established by the legislature or by negotiated settlements is, of course, a hotly disputed topic. This question arises not only in the criminal justice context but also in the civil justice realm, to which the discussion now turns.

NOTES

1 James Eisenstein and Herbert Jacob, *Felony Justice: An Organizational Analysis of Criminal Courts* (Boston: Little, Brown, 1977), p. 47.

2 *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

3 Paul B. Wice, *Public Defenders and the American Justice System* (Westport, CT: Praeger, 2005), pp. 31–38; and Deborah L. Rhode, *Access to Justice* (New York: Oxford University Press, 2004), chap. 6.

4 Malcolm M. Feeley, *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* (New York: Russell Sage Foundation, 1979), pp. 30–31.

5 *Report to the Nation on Crime and Justice*, 2nd ed. (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, 1988), pp. 11–12, 34–35.

6 Vera Institute of Justice, *Felony Arrests*, rev. ed. (New York: Longman, 1981), p. 5, fig. 2; and Hans Zeisel, *The Limits of Law Enforcement* (Chicago, IL: University of Chicago Press, 1982), p. 32, fig. 9.

7 James Q. Wilson, *Thinking about Crime* (New York: Basic Books, 1975), p. xii.

8 Brian Forst, Judith Lucianovic, and Sarah J. Cox, *What Happens after Arrest?* (Washington, DC: National Institute of Law Enforcement and Criminal Justice, 1977), pp. 62–68; and Vera Institute, *Felony Arrests*, pp. 6–22.

9 Wayne H. Thomas, Jr., *Bail Reform in America* (Berkeley: University of California Press, 1976), pp. 40–41.

10 *In re Humphrey*, 482 P.3d 1008 (Cal. 2021).

11 On the early bail reform movement, see Roy B. Flemming, *Punishment Before Trial: An Organizational Perspective on Felony Bail Processes* (New York: Longman, 1982). On the effects of pretrial confinement on case outcomes, see John Goldkamp, "The Effects of Detention on Judicial Decisions: A Closer Look," *Justice System Journal* 5 (Spring 1980): 234–257.

12 Mary A. Toborg, *Pretrial Release: A National Evaluation of Practices and Outcomes* (Washington, DC: National Institute of Justice, 1981); and Vera Institute of Justice, *Felony Arrests*.

13 John Goldkamp, "Questioning the Practice of Pretrial Detention: Some Empirical Evidence from Philadelphia," *Journal of Criminal Law and Criminology* 74 (1983): 1556–1588; and Paul Cassell and Richard Fowles, "Does Bail Reform Increase Crime? An Empirical Assessment of the Public

Safety Implications of Bail Reform in Cook County, Illinois," *Utah Law Digital Commons* (2020),

14 *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

15 David Neubauer, *Judicial Process: Law, Courts, and Politics in the United States* (Pacific Grove, CA: Brooks/Cole, 1991), p. 205.

16 Quoted in Lawrence Baum, *American Courts: Process and Policy*, 2nd ed. (Boston: Houghton Mifflin, 1990), p. 176.

17 Quoted in Milton Heumann, *Plea Bargaining* (Chicago, IL: University of Chicago Press, 1977), p. 60.

18 Eisenstein and Jacob, *Felony Justice*, p. 248.

19 The caseload-pressure hypothesis is put forth by Abraham Blumberg, *Criminal Justice* (Chicago, IL: Quadrangle Books, 1967). For a critique, see Heumann, *Plea Bargaining*, chap. 3.

20 Lawrence M. Friedman, "Plea Bargaining in Historical Perspective," *Law and Society Review* 13 (Winter 1979): 223, 231.

21 On criminal prosecutions in Los Angeles, see Lynn M. Mather, *Plea Bargaining or Trial?* (Lexington, MA: Lexington Books, 1979); on prosecutions in Baltimore, see Eisenstein and Jacob, *Felony Justice*, chap. 4.

22 Albert W. Alschuler, "The Prosecutor's Role in Plea Bargaining," *University of Chicago Law Review* 36 (Fall 1968): 50–112.

23 See Feeley, *The Process Is the Punishment*, and Heumann, *Plea Bargaining*. Of course, their perception of what justice requires may be mistaken, either because their understanding of justice is flawed, or because they lack sufficient information to make an informed judgment.

24 Peter F. Nardulli, *The Courtroom Elite: An Organizational Perspective on Criminal Justice* (Cambridge, MA: Ballinger, 1978), p. 68.

25 Critiques of plea bargaining include Jonathan D. Casper, *American Criminal Justice: The Defendant's Perspective* (Englewood Cliffs, NJ: Prentice Hall, 1972), and Kenneth Kipnis, "Criminal Justice and the Negotiated Plea," *Ethics* 56 (1976): 93–106.

26 Michael L. Rubinstein and Teresa J. White, "Alaska's Ban on Plea Bargaining," *Law and Society Review* 13 (Winter 1979): 367–383.

27 See, for example, Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Color Blindness* (New York: New Press, 2010).

28 Heumann, *Plea Bargaining*, p. 142.

29 For the views of attorneys and judges, see ibid., pp. 67, 101, 125, 141.

30 *Missouri v. Frye*, 566 U.S. 134 (2012); *Lafler v. Cooper*, 566 U.S. 166 (2012).

31 Yale Kamisar, "The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment 'More than an Empty Blessing,'" *Judicature* 62 (February 1979): 337–350.

32 See, for example, Abraham Goldstein, *The Insanity Defense* (New Haven, CT: Yale University Press, 1967).

33 For critiques of claims that sentencing is "lenient," see Stuart A. Scheingold, *The Politics of Law and Order* (New York: Longman, 1984), pp. 151–153;

and Michelle Alexander, *The New Jim Crow*. For a critique of claims that sentencing is discriminatory, see John Hagan, "Extra-Legal Attributes and Criminal Sentencing: An Assessment of the Sociological Viewpoints," *Law and Society Review* 8 (Spring 1984): 357–383. For the claim that sentencing reforms unduly restrict judicial discretion, see Kate Stith and José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (Chicago, IL: University of Chicago Press, 1998).

34 *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

35 See, for example, *State v. Sheridan*, 96 N.W. 730 (Iowa 1903).

36 *Weeks v. United States*, 232 U.S. 383 (1914).

37 *Wolf v. Colorado*, 388 U.S. 25 (1949).

38 *Mapp v. Ohio*, 367 U.S. 643 (1961).

39 See, for example, *United States v. Leon*, 468 U.S. 897 (1984); and *Utah v. Strieff*, 579 U.S. 232 (2016).

40 *People v. Defore*, 150 N.E. 585 (1926).

41 Bradley C. Canon, "Is the Exclusionary Rule in Failing Health? Some New Data and a Plea against a Precipitous Conclusion," *Kentucky Law Journal* 62 (1983–1984): 681–730; Dallin H. Oaks, "Studying the Exclusionary Rule in Search and Seizure," *University of Chicago Law Review* 37 (1970): 665–757; and James E. Spiotto, "Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives," *Journal of Legal Studies* 2 (1973): 243–278.

42 National Institute of Justice, *Criminal Justice Research Report—The Effects of the Exclusionary Rule: A Study in California* (Washington, DC: Department of Justice, National Institute of Justice, 1982); and Thomas Y. Davies, "A Hard Look at What We Know (and Still Need to Learn) about the 'Costs' of the Exclusionary Rule: The NIJ Study and Other Studies of 'Lost' Arrests," *American Bar Foundation Research Journal* 1983 (Summer): 611–689.

43 Peter F. Nardulli, "The Societal Cost of the Exclusionary Rule: An Empirical Assessment," *American Bar Foundation Research Journal* 1983 (Summer): 595, table 2; 597, table 7; 601, table 12.

44 Ibid., p. 603, table 13.

45 The Attorney General's Task Force on Violent Crime, *Final Report* (Washington, DC: Department of Justice, 1981), Recommendations, 40, 55–56.

46 *Heien v. North Carolina*, 574 U.S. 54 (2014).

47 Steven R. Schlesinger, *Exclusionary Injustice: The Problem of Illegally Obtained Evidence* (New York: Marcel Dekker, 1977), pp. 77–84.

48 Jonathan D. Casper, Kennette Benedict, and Jo L. Perry, "The Tort Remedy in Search and Seizure Cases: A Case Study in Juror Decision Making," *American Bar Foundation Research Journal* 13 (Spring 1988): 279–303.

49 *M'Naghten's Case*, 10 Clark & Fin. 200, 8 Eng. Rep. 718, 722 (1843).

50 American Law Institute, *Modern Penal Code*, sec. 4.01 (1962).

51 Rita J. Simon and David E. Aaronson, *The Insanity Defense: A Critical Assessment of Law and Policy in the Post-Hinckley Era* (New York: Praeger, 1988).

52 Gare A. Smith and James A. Hall, "Evaluating Michigan's Guilty but Mentally Ill Verdicts: An Empirical Study," *Journal of Law Reform* 16 (1982): 77–114.

53 Grant T. Harris, Marnie E. Rice, and Catherine A. Cormier, "Length of Detention in Matched Groups of Insanity Acquittees and Convicted Offenders," *International Journal of Law and Psychiatry* 14 (1991): 223–236.

54 See Francis A. Allen, *The Decline of the Rehabilitative Ideal* (New Haven, CT: Yale University Press, 1981).

55 On the problems of rehabilitation as a penological approach, see Douglas Lipton, Robert Martinson, and Judith Wilks, *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (New York: Praeger, 1975).

56 Sandra Shane-DuBow, Alice P. Brown, and Erik Olsen, *Sentencing Reform in the United States: History, Content, and Effect* (Washington, DC: U.S. Government Printing Office, 1985).

57 *Ewing v. California*, 538 U.S. 1 (2003).

58 *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005).

59 See James A. Beha II, "'And Nobody Can Get You Out': The Impact of a Mandatory Prison Sentence for the Illegal Carrying of a Firearm, on the Use of Firearms, and on the Administration of Criminal Justice in Boston," *Boston University Law Review* 57 (1977): 96–146 (part 1), 289–333 (part 2).

60 Quoted in Samuel Walker, *Taming the System: The Control of Discretion in Criminal Justice, 1950–1990* (New York: Oxford University Press, 1993), p. 125.

61 On the effects of the three-strikes approach, see Franklin E. Zimring, Gordon Hawkins, and Sam Kamin, *Punishment and Democracy: Three Strikes and You're Out in California* (New York: Oxford University Press, 2001), and Thomas B. Marvell and Carlisle E. Moody, "The Lethal Effects of Three-Strikes Laws," *Journal of Legal Studies* 30 (2001): 89–106.

62 See Tamasak Wicharaya, *Simple Theory, Hard Reality: The Impact of Sentencing Reforms on Courts, Prisons, and Crime* (Albany: State University of New York Press, 1995).

63 Stith and Cabranes, *Fear of Judging*, p. 63, table 1.

64 Quoted in ibid., p. 83.

65 Ibid., p. 145.

66 The account of drug courts draws upon James L. Nolan, Jr., *Reinventing Justice: The American Drug Court Movement* (Princeton, NJ: Princeton University Press, 2001); Kevin S. Burke, "Just What Made Drug Courts Successful?" *Judicature* 94 (November–December 2010): 119–127; and Peggy Fulton Hora, William G. Schema, and John T. A. Rosenthal, "Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America," *Notre Dame Law Review* 74 (January 1999): 439–538.

67 Quoted in Nolan, *Reinventing Justice*, p. 45.

68 Chief Justice Kaye's comment is quoted in John Feinblatt, Greg Berman, and Derek Denckla, "Judicial Innovation at the Crossroads: The Future of Problem-Solving Courts," *The Court Manager* 15 (2000): 28.

69 Quoted in Nolan, *Reinventing Justice*, p. 192.

70 Hora, Schema, and Rosenthal, "Therapeutic Jurisprudence," p. 469.

71 See "Drug Courts: The Second Decade" at http://www.ncjrs.gov; Burke, "Just What Made Drug Courts Successful?", pp. 122–124; and "Recidivism and Other Findings Reported in Selected Evaluations of Drug Court Programs Published 2000–Present," at http://www.spa.american.edu/justice/document_center.php.

72 This and the succeeding paragraph rely on Nolan, *Reinventing Justice*, chap. 8.

73 Morris Hoffman, "The Drug Court Scandal," *North Carolina Law Review* 78 (June 2000): 1502.

74 Major sources on capital punishment in the United States include David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* (Cambridge, MA: Belknap Press, 2010); Raymond Paternoster, Robert Brame, and Sarah Bacon, *The Death Penalty: America's Experience with Capital Punishment* (New York: Oxford University Press, 2008); Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydstun, *The Decline of the Death Penalty and the Discovery of Innocence* (New York: Cambridge University Press, 2008); and the website of the Death Penalty Information Center, at http://www.deathpenaltyinfo.org/.

75 David Oshinsky, *Capital Punishment on Trial: "Furman v. Georgia" and the Death Penalty in Modern America* (Lawrence: University of Kansas Press, 2010), p. 10.

76 *Furman v. Georgia*, 408 U.S. 238, 308 (1972).

77 *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

78 The aggravating factors are drawn from Georgia's death-penalty statute, and the mitigating factors from Florida's. See www.deathpenaltyinfo.org/aggravating-factors-capital-punishment-state and www.jdsupra.com/post/documentViewer.aspx?fid=d61d8c7b-896b-4c1a-bd87-f86425206b45.

79 *McCleskey v. Kemp*, 481 U.S. 279 (1987). The research relied upon by those challenging the death penalty was published in David C. Baldus, George G. Woodworth, and Charles A. Pulaski, Jr., *Equal Justice and the Death Penalty* (Boston: Northeastern University Press, 1990).

80 *Coleman v. Balkcom*, 451 U.S. 949, 958 (1981).

81 Justice John Paul Stevens's quotation is from *Spaziano v. Florida*, 468 U.S. 447, 481 (1984).

82 See "Symposium on the Impact of the Death Penalty," *American Law and Economics Review* 11 (Fall 2009): 249–574.

83 Arthur L. Alarcón and Paula M. Mitchell, "Executing the Will of the Voters? The California Legislature's Multi-Billion-Dollar Death Penalty Debacle," *Loyola of Los Angeles Law Review* 44 (2011): S46–S241.

84 John Roman, Aaron Chalfin, Aaron Sundquist, Carly Knight, and Askar Damenov, *The Cost of the Death Penalty in Maryland* (Washington, DC: The Urban Institute, 2008).

85 *Thompson v. McNeil*, 556 U.S. 1114 (2009). Justice Stevens further notes in his opinion that according to the Bureau of Justice Statistics, more than 30 percent of the death verdicts imposed between 1973 and 2000 were overturned.

86 For a listing of exonerated defendants, see the website of the Death Penalty Information Center, at www.deathpenaltyinfo.org/innocence-and-death-penalty. On the Illinois experience, see http://www.deathpenaltyinfo.org/illinois-1. On the need to improve the process of capital punishment in Texas, see Mark White, "Texas Must Take Steps to Ensure Guilt in Criminal Cases," *Houston Chronicle*, May 18, 2012, at http://www.chron.com/default/article/Texas-must-take-steps-to-ensure-guilt-in-capital-3569280.php.

7

✵

Civil Justice and the Courts

"What happened to Kerry was not an act of God; it was an act of Dow."[1] That, at least, was Michael Ryan's explanation of why, four years after he had returned from military service in Vietnam, his daughter was born with multiple birth defects. Like many other soldiers, Ryan had been exposed to Agent Orange, a chemical defoliant sprayed by U.S. troops on fields and forests to destroy enemy crops and cover. And, like them, he was convinced that Agent Orange caused death or debilitating illness in those exposed to the chemical and led to birth defects among their offspring. Ryan, together with other Vietnam veterans, blamed their problems on the chemical companies that produced Agent Orange—and they demanded justice.

Having a sense of injury and injustice is not, however, the same as proving liability in a court of law. Monsanto, Dow, and other producers of Agent Orange consistently denied that it had toxic effects. Because the cancers suffered by veterans, and the birth defects among their children, were not distinctive, it would be difficult to prove that they were linked to Agent Orange rather than to other causes. The legal effort to establish such a link would ultimately involve almost 1500 law firms, representing more than 2.4 million Vietnam veterans and their families. Against them were arrayed seven corporate defendants, who together spent roughly $100 million in preparation for the Agent Orange trial.

The litigation began in 1978 when Paul Reutershan, a Vietnam veteran dying of cancer, filed suit against Dow and two other chemical manufacturers. Although Reutershan died before the year ended, other Agent Orange suits followed in several jurisdictions. Early in 1979, Victor Yannacone, an attorney, filed an amended version of the Reutershan complaint as a class-action suit. His suit sought damages "in the range of $4 billion to $40 billion" as a trust fund for "all those so unfortunate as to have been and now to be situated at risk, not only during this generation

DOI: 10.4324/9781003440055-9

but during generations to come."[2] A panel of federal judges authorized the formation of a class, which would include those allegedly at risk because of Agent Orange, and then consolidated several cases for hearing by a federal district court in New York.

Before trial could start, however, crucial legal issues had to be addressed. Were the defendants immune from suit, as they claimed, because they had produced Agent Orange at the request of the government? Should the judge apply state or federal law in deciding the case? In addition to developing legal arguments on these and other questions, the plaintiffs' lawyers had to establish a causal connection between Agent Orange and the disabilities suffered by veterans and their offspring. This was particularly difficult because, as one of their lawyers put it: "Our clients could not help us prove our case. After all, they had not been hit by a truck, victimized by a doctor, or injured by a drug or other consumer product. They didn't know what had happened to them or when it happened. They only knew that something had gone wrong."[3] Thus, to prove their case, the plaintiffs were forced to rely on laboratory studies, epidemiological evidence, and information culled from the files of the defendant companies.

Aggravating these difficulties was the disparity in resources between the parties in the litigation. As Judge George Pratt observed early in the case, the plaintiffs "have limited resources with which to press their claims and [their] plight becomes more desperate and depressing as time goes on," whereas the defendants "have ample resources for counsel and expert witnesses to defend them and probably gain significantly from every delay that they can produce."[4] This problem led to the formation of a consortium of interested lawyers to bear the expenses of preparing the case. Even then, the plaintiffs' lawyers often found themselves overmatched.

After five years with little progress, the litigation shifted into high gear with the assignment in October 1983 of Judge Jack Weinstein to succeed Judge Pratt, who had been elevated to the court of appeals. Determined to move the case to resolution, Judge Weinstein established a trial date of May 7, 1984. His action spurred feverish—but largely unsuccessful—efforts by the plaintiffs' attorneys to develop evidence clearly linking Agent Orange to their clients' afflictions. The prospect of a trial also moved the two sides toward settlement because of uncertainty about its outcome and the calamitous consequences of losing for either side.

On Saturday, May 5, two days before the trial was to begin, Judge Weinstein convened all the attorneys to discuss a settlement, instructing them to "bring their toothbrushes" and to be prepared to stay all night Saturday and Sunday if necessary. His intervention succeeded. At 3 a.m.

on May 7, just hours before jury selection was to begin, the weary negotiators reached a compromise settlement, under which the chemical companies refused to admit responsibility but agreed to pay the veterans $180 million. The largest class-action suit to that point in U.S. history was over.

The Agent Orange litigation highlights three aspects of civil justice in the United States.

1. *Resolution by negotiation.* Despite the intense preparations for trial, the Agent Orange case was resolved through negotiations between plaintiffs and counsel for the defendants. This is characteristic of most civil cases, which are settled rather than adjudicated. Although few judges are as active as Judge Weinstein in pushing for settlement, most courts have adopted procedures to promote fact-finding before trial to encourage litigants to settle cases. The negotiations in civil cases occur "in the shadow of the law"; that is, with the understanding that either party can demand a trial if a satisfactory agreement cannot be reached. Thus, the process of civil justice parallels the process of criminal justice: the encouragement of negotiated settlements, the prospect of trial should negotiations fail, and the resolution of most cases without trial.
2. *Access to justice and the "litigation explosion."* The Agent Orange case also highlights an important dispute about the American system of civil justice. One view is that the basic problem in civil justice is ensuring access to the courts for ordinary citizens. From that perspective, one might view the Agent Orange litigation as something of a triumph. For the most part, the plaintiffs were persons of moderate means who had suffered health problems that they attributed to the negligence of large corporations. Yet these plaintiffs were able to secure legal counsel, to gain a hearing for their claims in the courts, and to obtain at least some redress for their suffering—in short, to gain access and secure some measure of justice. Other commentators, however, insist that the main problem confronting the U.S. system of civil justice is excessive litigation. They insist that the propensity to litigate has produced a "litigation explosion," overburdening the courts and weakening the American economy. The Agent Orange case by itself did not cause this problem, though it placed heavy demands on the courts during its six-year duration. But it does exemplify a type of case—one involving mass exposure to serious health risks—that has significantly increased the civil caseloads of federal and state courts. Although proponents of this view acknowledge that those who cause injuries should be called to account, they favor mechanisms outside the courts for dealing with such problems.[5]

3. *The diversity of civil litigation.* No single case or set of cases can mirror the diversity of civil litigation in the United States. The Agent Orange case belongs to the category of tort law—that is, cases involving non-contractual wrongs or injuries for which damages are sought. Tort cases may entail, as in the Agent Orange litigation, multiple claims by workers or consumers against the actions or products of a limited number of corporations. More often, though, they involve relatively simple suits for damages by one individual against another, seeking compensation for damages or injuries suffered in, for example, an automobile accident. (Tort litigation is discussed in detail in Chapter 11.)

Although tort cases are highly publicized, American courts also address many other sorts of civil cases. Some civil cases involve contractual disputes, either between businesses or, more frequently, between a business—usually attempting to collect a debt—and a consumer. Others arise out of domestic relationships, involving such matters as divorce, child support, and adoption. Still others involve the legal transfer of property from one party to another, as occurs through the administration of a will or the handling of the estate of someone who died intestate (without a will). Finally, civil cases may involve the legal relationship between governments and citizens. These cases range from constitutional challenges to governmental policies, such as mandatory vaccination requirements, to governmental suits to compel compliance with environmental regulations, antitrust laws, or other statutes.

This description of the types of civil cases raises questions: Why do some conflicts get transformed into legal disputes and taken to court, while others do not? How do courts deal with civil cases brought before them? And how well is the U.S. system of civil justice operating? Are there ways to improve it? This chapter addresses those questions.

HOW CASES ARISE

Under the American adversarial system of justice, there cannot be a case without a dispute. However, not every dispute, even if it has a legal dimension, is brought to court for resolution. Let us examine how disputes arise and the various means available for dealing with them.

Injuries and Grievances

Simply put, legal cases arise out of disputes, which arise out of grievances, which in turn arise out of injuries.[6] People suffer injuries—physical, economic, psychic—every day. These injuries do not become grievances, however, unless the injured party believes that she is unjustly deprived by another party of something to which she is entitled. Injuries do not become litigable grievances—that is, grievances one could take to court—unless one is deprived of something to which one is legally entitled. A few examples may help clarify this. You have no grievance against the government, for example, if it imprisons you for a crime you have committed, because your loss of liberty is deserved. Or suppose your house is destroyed by a tornado. In such a case, you suffered an injury that was undeserved, but you have no grievance, because no one is responsible for the damage. Finally, suppose you operate a pizzeria, and a competitor cuts into your sales. You certainly have suffered harm and know who caused it, but there is no litigable grievance, because you had no legal right to a fixed level of sales or profits.

By establishing rights and entitlements and by imposing obligations, law defines what constitutes a litigable grievance. This definition may vary from one society to another and over time, as the law responds to shifts in public opinion. Some scholars attribute part of the increase in litigation in the United States and elsewhere to legal changes brought about by just such a shift in public opinion.[7] They contend that, as advances in science and technology have made it possible to control situations of peril or need, the public has begun to claim a right to be free from unnecessary risk. The law, reflecting this claim, has imposed obligations on government and private parties to deliver goods and services that meet achievable standards of safety and usefulness. It has also made it easy to sue when these obligations are not met; as a result, civil suits have increased.

Responses

Suppose you buy a car that fails to perform to your expectations. You can respond to the situation in several ways. You might do nothing, perhaps justifying your inaction by arguing that everyone gets stuck once in a while ("lumping it"). You might also resolve never to purchase another car from that dealer or that manufacturer. Social scientists call such efforts to reduce or eliminate contact with a disputant "avoidance." Or you might go to the dealership and claim that the car should be repaired or that you should be reimbursed for your inconvenience. The dealer might accept your claim, thereby resolving the matter. Or the dealer might make a counteroffer, perhaps to replace defective parts if you pay the labor costs, and a negotiated settlement might be reached. Finally, the dealer may reject your claim, in which case a dispute exists.

What are your options then? One possibility is coercion, the threat or use of force to get what you claim is rightfully yours. But other forms of dispute resolution are more likely. You might seek the intervention of a third party, such as the Better Business Bureau, to help resolve the dispute through mediation. Or you might seek a binding resolution of your dispute outside the courts through arbitration. (These modes of dispute resolution are discussed later in this chapter.) Finally, you might choose to take your grievance to court.

How people deal with their grievances depends on the grievance. Surveys indicate that people who believe that they have suffered discrimination are unlikely to take action, whereas those who have suffered physical injuries or damage to their property are likely to press claims. Overall, most people resolve their grievances outside the legal system. Thus a national survey of 1000 randomly selected households found that, of 1000 grievances, only 718 resulted in claims. Those 718 claims led to only 449 disputes. In just 103 of those disputes were lawyers consulted, and in only 50 was a case filed in court.[8] Three factors explain why people are reluctant to take their disputes to court.

1. *Adverse consequences of filing suit.* Many disputants are reluctant to go to court because they fear that escalating the conflict will produce a backlash. This is particularly true when the disputants have ongoing relationships that might be jeopardized by a suit. Thus, family members may prefer to settle their disputes out of court; so, too, may neighbors, business partners, and employees involved in disputes on the job. As one victim of sex discrimination put it, if she were to sue, "a lot of people might go against me … I wouldn't want to ruin the relationships I do have there."[9]
2. *Costs of litigation.* Disputants also recognize that litigation, with its attorney fees and court costs, is expensive. A trial also may require plaintiffs to miss work, costing them income or even putting their jobs in jeopardy. Added to these monetary costs may be psychic costs. Disputants may be uncomfortable consulting a lawyer or anxious about appearing in court. Thus, even if they have a legitimate grievance, disputants may conclude that the costs of going to trial outweigh the expected payoff from a successful suit, or that another less costly forum should be used for resolving the dispute.[10]
3. *Uncertainty.* Because they do not know the applicable law, potential litigants may be uncertain about their chances of success. They also may be skeptical about whether a single individual can prevail against a company or the government. This uncertainty may deter them from filing suit. As one victim of wage discrimination put it, it would be "me against a large corporation" and thus "my word against a [more powerful] someone else's."[11]

Nevertheless, some disputants do consult lawyers and file suit. When they do, their cases proceed through certain legally established steps from initiation to resolution. It is to these steps, and to the law governing them, that we now turn.

RULES AND PROCESSES

Rules

Civil litigation is governed by three sets of rules. One set of rules establishes the substantive legal standards that judges apply in deciding cases. For example, a statute might define and outlaw racial discrimination, an administrative regulation might set water-quality standards, or the common law might determine when one can collect damages for injuries one has suffered. A second set of rules governs the jurisdiction of courts and thus guides lawyers on the proper court in which to file a case. A third set of rules determines the procedures that lawyers must follow in framing and presenting a case from its inception to the exhaustion of all appeals.

For most of American history, the procedural rules governing civil cases have been established within each state by state statutes or state court rulings. Instead of developing their own procedural rules, each federal court followed the procedures of the state in which it heard cases. Attorneys complained, however, that this lack of procedural uniformity was confusing, and the American Bar Association (ABA) campaigned for a standard set of procedural rules for federal litigation. In 1938, in response to these efforts, the Federal Rules of Civil Procedure were adopted. These new rules established a uniform procedure for federal courts that its supporters hailed as "flexible, simple, clear, and efficient."[12] More than half the states have conformed their procedural requirements to the Federal Rules of Civil Procedure.

The Process of Civil Litigation

Because most civil cases are resolved before trial, what occurs during the pretrial phase of litigation is vitally important. The pretrial phase serves to identify the applicable law, define the legal issues, and promote the discovery of factual information pertinent to the case. The four major steps during the pretrial phase are (1) pleadings, (2) discovery, (3) motions, and (4) pretrial conference.

Pleadings A case begins when the plaintiff files a written complaint with the trial court. Under the Federal Rules of Civil Procedure, a complaint must merely (1) describe the factual basis for the suit, (2) explain why the court has jurisdiction over the case, (3) outline the legal theory on which the complaint relies, and (4) indicate the damages or other relief the plaintiff seeks. The requirements of the Federal Rules of Civil Procedure are met if the complaint reveals enough information so that the defendant can understand the basis for the suit and respond to the complaint.

Once the plaintiff has filed a complaint, the defendant in the case must be "served" with the complaint—that is, the defendant must be formally notified of the complaint and summoned to appear in court at a particular date and time. Should the defendant fail to appear at the appointed time, the judge may rule in favor of the plaintiff without hearing evidence. This is called a *default judgment*.

Usually, however, defendants file an answer to the plaintiff's complaint, rejecting some or all of the allegations. In the Agent Orange case, for example, the chemical companies denied that their product had caused the health problems suffered by the veterans and their children. Those matters on which the plaintiff and defendant differ then become the basis for the dispute. Alternatively, defendants may admit the truth of the plaintiff's allegation but offer an affirmative defense—that is, they may introduce new facts designed to produce a decision in their favor. A skydiving instructor, for instance, may admit that a student died during a jump but note that the student signed a form acknowledging the dangers of skydiving and pledging not to hold the school or instructors responsible for any mishaps. Finally, defendants may respond with a counterclaim, the equivalent of a complaint against the plaintiff. Thus, a driver sued for damages arising out of a traffic accident might file a counterclaim for the damages to her car.

Even a plaintiff who has no intention of taking a dispute to trial may have tactical reasons for filing a complaint. She might file a complaint to "engage the authority of the legal system" on her behalf, thereby strengthening her position in the informal resolution of the dispute.[13] Filing a complaint may also signal how seriously the plaintiff views the matter under dispute, thereby inviting the defendant to enter into negotiations to deal with the situation.

Discovery Discovery involves the pretrial exchange of information between the parties in a lawsuit. Under the Federal Rules of Civil Procedure, every party to a civil action is entitled to the disclosure of all relevant information in the possession of any person. Thus, plaintiffs may demand from defendants, or defendants from plaintiffs, all the information they possess relevant to the subject matter of the case. They may also, during discovery, question witnesses and others who possess pertinent information. The sole exception to full disclosure is for privileged information, such as communications between an attorney and a client or between a doctor and a patient. The Federal Rules of Civil Procedure permit such broad scope for discovery to prevent a party from hiding damaging evidence, or to prevent an attorney from springing a surprise on an unwary opponent at trial. In so doing, the rules seek to promote verdicts based on the weight of the evidence rather than on courtroom tactics. Full disclosure of facts before trial may also encourage litigants to settle cases. Parties sometimes fail to settle cases because they overestimate the strength of their own position or underestimate that of their opponents. Discovery, however, allows an informed assessment of the strengths and weaknesses of the opposing positions and of the likely outcome of a trial.

Lawyers employ three tools during discovery: *depositions*, *interrogatories*, and the production of documents and other physical evidence. A deposition involves oral questioning of a witness under oath. Attorneys for both sides question and cross-examine witnesses, and their answers are recorded. This testimony may later be introduced at trial, and an alert attorney will pounce on discrepancies between what a witness says at trial and what he said when he was deposed. An interrogatory consists of a set of written questions directed to a party in a case, to which written answers are prepared and signed under oath. A party to a case may also be required, during discovery, to produce documents or objects for the other party to inspect, photograph, or copy, and to permit access to its premises and its files for these purposes. In addition, the plaintiff in a personal injury case may be required to undergo a physical examination by a physician chosen by the defendant or by the court to substantiate an injury claim. Should a party object to questions or to other requests for information or materials, a judge determines whether the requests are legitimate.

In most cases, requests for information or materials during discovery are quite limited. However, discovery in complex cases can be time consuming and expensive. In the first five years of the IBM antitrust case, for example, 64 million pages of records and documents were obtained through discovery.[14] In some instances, "overdiscovery" has led to abuses. According to one judge, "For many lawyers, discovery is a Pavlovian reaction. When the lawsuit is filed, the word processor begins to grind out interrogatories and requests for production. Deposition notices drop like autumn leaves."[15]

Plaintiffs may file suit with little basis for their claims, hoping that a "fishing expedition" in the defendant's files during discovery might provide them with the evidence they lack. Attorneys may also multiply requests for information during discovery to drive up the opposing party's expenses or to induce a settlement. Thus, a lawyer for R. J. Reynolds candidly described the strategy behind the tobacco firm's use of depositions in defending a suit: "To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds's money, but by making the other son of a bitch spend all of his."[16] Although the Federal Rules of

Civil Procedure permit judges to impose sanctions, including withholding attorneys' fees, on those who abuse discovery, this has not curbed abuses.

At each stage of the pretrial phase of a case, attorneys for either party can file motions, which are requests that the judge either issue a legal ruling or take some other action. Under the Federal Rules of Civil Procedure, these motions must be submitted in writing and must specify the legal basis for the motion and the relief or order sought.

Some motions concern procedural matters relating to the conduct of the case. For example, a defendant may file a motion requesting that the plaintiff be required to amend his complaint to clarify the basis for the suit. Or either party may ask the judge to determine whether certain information is subject to discovery. With other motions, a party may seek a resolution of the case in its favor before trial. In the Agent Orange case, for example, the defendant corporations sought dismissal of the complaint, claiming that they were immune from suit because they were fulfilling a request from the government in producing Agent Orange. Similarly, if the defendant fails to respond to a complaint, the plaintiff may move for a default judgment. Finally, either the plaintiff or the defendant may move for a summary judgment—a binding determination of the case without a trial. However, a judge can grant a motion for summary judgment only if the law is clear and the facts of the case are undisputed, leaving no issue to submit to a jury.

How often are cases resolved through motions rather than settled or adjudicated? In an intensive study of a sample of more than 1600 cases in state and federal courts, Herbert Kritzer found that 12 percent of the cases were dismissed for technical reasons or dismissed for cause (e.g., failure to state a claim). In another 15 percent, the judge issued a summary judgment, entered a default judgment for the plaintiff, or otherwise decided the case. Thus, although only 7 percent of the sample went to trial, judges contributed to the resolution of an additional 27 percent of civil cases.[17]

Pretrial Conference The Federal Rules of Civil Procedure authorize, but do not mandate, a conference between the judge and attorneys before a case goes to trial. Most states have followed the federal lead in providing for pretrial conferences. At these conferences, usually held after discovery is completed, the judge and the attorneys identify the points of agreement and the issues still in dispute. The attorneys also reveal what witnesses they will call and what evidence they will introduce, thereby facilitating the planning of the trial. In complicated cases, a judge may schedule earlier conferences with the attorneys to expedite the process of discovery.

As the Agent Orange litigation shows, pretrial conferences may also promote the settlement of cases. Judges may initiate settlement discussions when lawyers are reluctant to do so out of fear that the suggestion might be interpreted as a sign of weakness. Some also offer attorneys their own assessment of the strengths and weaknesses of the opposing positions and their views on whether settlement offers are reasonable. Attorneys generally applaud aggressive judicial participation in the settlement process. They are more likely to view a settlement as fair if it has received a judicial endorsement, and such an endorsement may help them persuade a recalcitrant client to accept a reasonable settlement offer.[18]

CIVIL CASES AND THEIR OUTCOMES

The Universe of Cases

Federal district courts decided almost 275,000 civil cases in 2022, and state trial courts more than 16 million. The civil caseloads in these courts are extremely diverse. Cases such as the Agent Orange suit involve hundreds of millions of dollars. Others, such as litigation to collect debts, may involve a few hundred dollars at most. Some cases drag on for years—the Agent Orange is a prime example—but others are quickly settled. Still others—for example, uncontested divorces and adoptions—involve no real dispute but merely require judicial ratification of a settlement worked out between the parties.

Types of Civil Cases One way to capture the diversity of civil cases is to look at the types of cases that trial courts hear (see Tables 7.1 and 7.2). These tables reveal that, although federal and state trial courts both handle a wide range of civil cases, the mix of cases differs considerably. This is hardly surprising: Federal law and state law generally regulate different activities. For example, there is no federal divorce law and no state immigration law. Much of the civil litigation in federal courts involves the federal government as either plaintiff or respondent.

TABLE 7.1 Types of Cases in State Courts of General Jurisdiction, 2021

Contract	41%
Small Claims	16%
Probate/Estate	14%
Torts	6%
Mental Health	5%
Real Property	2%
Miscellaneous	16%

TABLE 7.2 Types of Cases in Federal District Courts, 2021

Contract	26,455
Real Property	3,249
Tort Actions	145,562
Personal Injury	(141,682)
Property Damage	(3,880)
Actions Under Statutes	169,301
Bankruptcy & Banks	(151)
Civil Rights	(43,333)
Environmental Matters	(466)
Immigration & Deportation	(4,613)
Intellectual Property Rights	(11,584)
Labor Laws	(13,442)
Prisoner Petitions	(47,669)
Tax Suits	(551)

Governmental actions and litigation priorities influence the character and extent of that litigation.

Federal legislation affects the types of private case commenced in federal district courts. A good example is diversity of citizenship cases, which involve suits between citizens of different states. In 1989, Congress raised the amount that must be at stake for diversity cases to be tried in federal court from $10,000 to $50,000, and in one year diversity cases dropped 15 percent.[19]

Types of Parties One may also look at civil cases in terms of the parties involved in the cases. One legal scholar, Marc Galanter, has suggested dividing the parties in civil cases into one-shotters (OS) and repeat players (RP). One-shotters are litigants who have only occasional recourse to the courts (e.g., spouses in divorce actions and taxpayers in tax cases). In contrast, repeat players are engaged in many similar cases over time (e.g., collection agencies in debt cases and the Internal Revenue Service in tax cases). One-shotters and repeat players may be either plaintiffs or defendants. Let us look at the various categories of litigation based on the parties in the case.[20]

OS versus OS Examples of this sort of litigation include parent vs. parent (custody proceedings), spouse vs. spouse (divorce), family vs. family member (inheritance or insanity commitment), and neighbor vs. neighbor. Much of this litigation merely involves judicial ratification of settlements previously agreed to by the parties. For example, more than 90 percent of divorces—by far the most numerous of these cases—are uncontested. When the cases involve real disputes, however, conflict can be intense because the parties often have close personal ties. Resentment or revenge may fuel the disputes.

RP versus OS Examples of this sort of litigation include prosecutor vs. accused, IRS vs. taxpayer, finance company vs. debtor, and landlord vs. tenant. Many repeat players have legal relationships with large numbers of one-shotters. Owners of apartment complexes, for example, enter into contracts with large numbers of tenants, and finance companies attempt to collect debts from many consumers. These repeat players file suits as part of their normal course of business, using the law to enforce contractual obligations. These cases make up a large part of civil litigation, though many cases are settled before trial.

OS versus RP Examples of this sort of litigation include tenant vs. landlord, welfare client vs. agency, injury victim vs. insurance company, and defamed vs. publisher. Generally, it is relatively rare for a one-shotter to sue a repeat player. The various factors discussed earlier—the adverse personal consequences of suing, the costs of litigation, and uncertainty about its outcome—deter many one-shotters from filing suit. The sole exception to this is personal injury cases. Because attorneys take such cases on a contingent basis—that is, their fee is a percentage of the plaintiff's award—one-shotters do not bear the financial costs of litigation, so they are more likely to sue.

RP versus RP Examples of this sort of litigation include a union vs. a company, a developer vs. a suburban community, a purchaser vs. a supplier, and a regulatory agency vs. firms of a regulated industry. Because many repeat players interact frequently with other repeat players, they are reluctant to jeopardize ongoing, mutually beneficial relationships, and so they tend to develop mechanisms outside the courts to resolve their disputes.

But there are exceptions to this pattern of low litigation rates. Some repeat players—for example, the American Civil Liberties Union and the Sierra Club—are committed to furthering particular ends and may be quite willing to reject compromise solutions and take disputes to court. Government also tends to be quite heavily involved in litigation with other repeat players, as both plaintiff and defendant.

Outcomes of Civil Cases The outcome of a civil case depends on the facts of the case, the applicable law, and the presentation of the case by the attorneys or by the parties in the case, if they are not represented by counsel. While the facts differ from case to case, some generalizations can be made about the effects of the law and the type of representation. Once again, Galanter's distinction between one-shotters and repeat players is useful.

OS versus OS In terms of legal representation, one-shotters typically tend to be evenly matched. Generally, either both parties have retained counsel or neither has, and they are unlikely to hire an attorney from the elite ranks of the legal profession. Because disparities in the quality of counsel are unlikely to determine the outcome of disputes between one-shotters, the substance of the law may have a decisive effect on the outcome of the case.

The effect of the law—and of changes in the law—on case outcomes are apparent if one looks at the most frequent cases pitting one-shotters against one-shotters: namely, divorce cases.[21] Before 1970, every state required fault-based grounds for divorce, such as adultery or mental cruelty, with the conduct of the parties during the marriage the key determinant of their financial rights and obligations after divorce. Under this law, women fared relatively well in the distribution of marital property and the provision of financial support. In 1970, however, California instituted a system of no-fault divorce, under which marriages could be dissolved on the basis of "irreconcilable differences." The California reform, which was soon adopted by other states, also established gender-neutral rules that removed many of the legal and financial protections that the law had provided. Thus, a consequence of instituting no-fault divorce, unanticipated and unintended by reformers, was that "women, and the minor children in their households, typically experience[d] a sharp decline in their standard of living after divorce."[22]

RP versus RP Because litigation is a normal part of their doing business, repeat players typically retain experienced, specialized counsel. Thus, as in cases involving one-shotters, disputes between repeat players usually involve a rough parity in legal representation. Because repeat players, unlike one-shotters, expect to litigate, they tend to take steps to ensure that the applicable law is favorable to their interests. They may seek to influence the law that government creates. Business and labor, for example, lobby hard on legislation dealing with laws that affect labor relations. If the applicable law arises out of private agreements, repeat players employ their legal expertise and negotiating skills to fashion favorable contracts. They also attempt to promote a body of judicial precedent favorable to their interests. Thus, in litigation, repeat players are concerned not merely with the outcome of individual cases but also with their long-term legal advantage. Repeat players who succeed in securing favorable legislation, contracts, and judicial interpretations can expect to advance their interests through litigation.

RP versus OS and OS versus RP Repeat players enjoy significant advantages in their disputes with one-shotters. Expecting conflicts in their transactions with one-shotters, repeat players structure the law at the outset to place themselves at an advantage. As Galanter observes, "It is the RP who writes the form contract, requires the security deposit, and the like," and one-shotters seldom seek to renegotiate the requirements.[23] Repeat players also do not share the one-shotters' concerns about litigating: They understand the process and have sufficient experience to calculate their chances of success. Unlike one-shotters, repeat players usually have hired or retained lawyers, and so their startup costs for litigating are minimal. The repeat players' lawyers tend to be specialists in the field, whereas those chosen by one-shotters may not be.

The different objectives pursued by one-shotters and repeat players may also work to the repeat players' advantage. As plaintiffs, one-shotters are concerned with having their claims vindicated, and, as defendants, with avoiding or minimizing liability. Repeat players, in contrast, are concerned not only with the present case but also with promoting a favorable outcome in future cases. They therefore will be inclined to settle cases that might establish unfavorable precedents and to adjudicate those that will yield favorable ones. As a result, over time repeat players can craft a body of law that serves their interests.

Are things really as dismal for one-shotters as Galanter's analysis suggests? Yes and no. Suits by repeat players against one-shotters constitute the largest category of litigation, and several studies suggest that repeat players generally prevail, often by default judgments.[24] (Of course, in many of these cases—for example, creditor–debtor cases—they may prevail because one-shotters have undeniably failed to meet their clear legal obligations.) One-shotters, however, have enjoyed considerable success as plaintiffs in product liability cases, in which they are suing manufacturers for injuries suffered as a result of alleged product defects.[25] These cases diverge in important respects from other disputes between one-shotters and repeat players. Expert legal representation for one-shotters tends to be readily available. Plaintiffs' lawyers in product liability cases are legal specialists who take cases on a contingent-fee basis. In addition, this segment of the bar shares the repeat players' interest in the long-term development of product liability law, and so it acts to secure a body of law favorable to their clients'—and their own—interests. In sum, aggressive attorneys representing one-shotters and their interests may help equalize the prospects of repeat players and one-shotters involved in a dispute.

A LITIGATION CRISIS?

The Indictment

In recent decades, the U.S. civil justice system has come under sustained attack. Consider the indictment: Americans have developed "a mad romance with the civil litigation process."[26] However outrageous the claim, there is a litigant willing to press it and a court to hear it (see Box 7.1). And encouraging this propensity to litigate differences and file frivolous suits is the world's largest legal profession. Not surprisingly, then, "our society has become the most litigious society in the world. No other nation is even close."[27] Further, "this massive, mushrooming litigation has caused horrendous ruptures and dislocations at a flabbergasting

Box 7.1 Outrageous Suits?

- A man sues a former girlfriend to force her to pay for his time and expenses for a date she did not keep.
- A class-action suit is filed against General Motors, on behalf of "all persons everywhere now alive and all future unborn generations," seeking $6 trillion in damages for pollution.
- After breaking her finger in a school softball game, a high-school student sues her gym teacher and the city, alleging that the teacher not only failed to instruct her on how to catch a ball but also failed to warn her of the dangers of the sport.
- A group of Washington Redskins fans sue to have a court overturn a controversial referee's call that cost the Redskins a win in a football game.
- The Italian Historical Society of America sues the U.S. Post Office, asking a federal court to bar the issuing of a stamp celebrating Alexander Graham Bell on the grounds that the telephone actually had been invented by Antonio Meucci.
- A woman sues the state of California after being told that she did not win the state lottery, because her ball popped out of the winning slot after momentarily entering it.

Of course, filing a suit and collecting damages are two different things. Courts rejected the plaintiffs' claims in all but the last case. The jury in that case awarded the disappointed lottery player the $3 million jackpot, plus $400,000 for her emotional trauma.

SOURCES: The first case is described in Lawrence M. Friedman, *The Republic of Choice: Law, Authority, and Culture* (Cambridge, MA: Harvard University Press, 1990), p. 16; the next four in Jethro K. Lieberman, *The Litigious Society* (New York: Basic Books, 1981), pp. 4–5; and the final case in Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (New York: Truman Talley Books, 1991), p. 170.

cost to the nation."[28] Litigants themselves bear some of the costs. With overloaded courts, justice is slower and more expensive than ever. The nation's economy also suffers. "Like a plague of locusts, U.S. lawyers with their clients have descended upon America and are suing the country out of business." Only the nation's economic competitors benefit as energies and resources are diverted from "research and development" to "document production and depositions."[29] Fundamental reform of the civil justice system is essential.

If this harsh assessment is accurate, then one could hardly oppose the call for reform. But is it accurate? Let us first consider the basic premise of the indictment; namely, that the United States is today an excessively litigious society.

Is the United States a Litigious Society?

One way to answer the question is to compare litigation rates in the United States with those in other nations. Contrary to the claims of alarmists, such a comparison suggests that the United States is not exceptional. Many countries—most notably Japan—have litigation rates far lower than those in the United States (see Box 7.2). But several others—including Australia, Denmark, England, and Israel—have roughly comparable per capita litigation rates, and many of these countries have likewise experienced a rapid growth in litigation in recent decades.[30]

One might also consider whether Americans are particularly prone to resolving their disputes by taking them to court. Americans generally do not transform their disputes into litigation, although willingness to litigate varies from issue to issue. The leading comparative study of the propensity to sue concludes that Americans tend to sue in cases of personal injury somewhat more often than Britons or Canadians, but not more often than Australians.[31] This evidence hardly supports the notion of a populace involved in "mad romance with the civil litigation process."

Finally, one might consider whether Americans are more litigious now than in the past. Certainly, the level of litigation in the United States has risen over time. This does not necessarily mean, however, that Americans have become more litigious; because the nation's population has also increased, there are more Americans to file suits. Indeed, from 1900 to 1960, per capita litigation in the United States remained relatively stable.[32] Since that time, however, the increases in litigation have outstripped population growth. Although this seems to support the notion that Americans have become more eager to sue, one should be cautious about drawing that conclusion.

The greatest single source of the increase in civil cases over time has been an increase in divorce and post-divorce proceedings (domestic relations cases). One author wryly notes: "Few of us, I suspect, know many

Box 7.2 Why Don't the Japanese Sue?

If the United States is seen as a litigious society, Japan has the opposite reputation. In one year, for example, Japan's per capita litigation rate was only one-tenth that of California's. This disparity is particularly striking because Japan shares with the United States many characteristics that tend to promote litigation, such as an advanced economy and an urbanized population. Why do the Japanese not sue?

One possible explanation for the disparity is cultural differences. Traditional Japanese values, it is argued, are oriented toward consensus, avoiding conflict, and subsuming personal concerns in the interest of the group. If the reluctance to litigate has derived from such traditional beliefs, then one would expect litigation rates to rise as the modernization of the society weakened those beliefs. But in fact litigation rates in Japan today are *lower* than in the past, so something beyond cultural factors must be involved.

Even as Japanese society changes, litigation rates have remained low because the government has adopted policies to discourage litigation. The Japanese government has restricted the size of the legal profession, thereby reducing access to legal services. The total number of practicing lawyers in Japan is lower than the number of graduates each year from U.S. law schools, and in Japan only 500 new lawyers annually are permitted to pass the bar exam. The rules of Japanese courts, such as the ban on class-action suits, also discourage individuals from pursuing claims. Finally, when disputes do arise, the Japanese government has developed alternative forums to handle them, such as its system of court-annexed mediation and the Traffic Accident Dispute Resolution Center.

The Japanese experience reveals that, when disputes arise, the values and expectations of the society can encourage or discourage litigation. But so, too, can governmental policies designed to reduce access, increase delay, and deny relief or, alternatively, to facilitate legal redress of grievances. Far from being the inevitable product of societal development, litigation reflects the values and institutions of the society.

SOURCES: Takao Tanase, "The Management of Disputes: Automobile Accident Compensation in Japan," *Law & Society Review* 24 (1990): 651–689; and Robert L. Kidder and John A. Hostetler, "Managing Ideologies: Harmony as Ideology in Amish and Japanese Societies," *Law & Society Review* 24 (1990): 895–922.

people who filed for divorce because they were enamored of litigation or beguiled by lawyers."[33] In addition, although civil filings rose during the late twentieth and early twenty-first centuries, they did not increase uniformly in all regions of the country and in all areas of the law, as might be expected if Americans had grown more litigious (see Table 7.3). Moreover, historical studies reveal that the growth in litigation in the United States over the course of the twentieth century was episodic and uneven, so the "litigation explosion" may be merely a short-term phenomenon. There is evidence to support this view. Although the civil litigation rate, excluding

TABLE 7.3 Civil Filings in Selected State Trial Courts, 2021

State	Civil Filings (General Jurisdiction Courts)
Arizona	192,702
Arkansas	165,242
California	4,668,950 (single tiered)
Hawaii	39,001
Iowa	634,002 (single tiered)
Kentucky	144,203
Minnesota	891,144 (single tiered)
Montana	50,174
New Jersey	822,737
New Mexico	107,506
New York	719,354
West Virginia	42,340

SOURCE: National Center for State Courts, Court Statistics Project, 2021, at www.courtstatistics.org.

domestic relations cases, rose 14 percent in state courts from 1984 to 1999, the rate actually declined almost 7 percent from 1991 to 1999.[34] Finally, historical studies show that current levels of per capita litigation in the United States are not unprecedented. Higher per capita rates existed in colonial times and during part of the nineteenth century.[35]

In sum, despite widely publicized claims to the contrary, the evidence suggests that the United States is not an unusually litigious society. Nonetheless, litigation in the United States may still adversely affect the legal system and the economy, as critics have charged. The next section considers current efforts to respond to litigation levels and improve the quality of civil justice.

IS THERE A BETTER WAY?

Despite their differences, critics of the “litigation explosion” and advocates of greater access to the courts agree that the American system of civil justice must be improved. The general public seems to share their dissatisfaction, viewing litigation as unduly slow, complex, and costly. Critics of American civil justice also complain that formal legal processes hamper the courts’ ability to address the problems underlying disputes and fashion lasting, consensual solutions to those problems.[36]

During the 1970s, legal reformers began to propose that less formal forums be created outside the courts to help solve the problems of heavy caseloads, costly justice, and ineffectiveness in settling disputes. In recent years this movement for “alternative dispute resolution”—or ADR, as it is usually called—has enjoyed considerable success. In 1990, Congress enacted the Administrative Dispute Resolution Act, which requires federal agencies to consider ADR for settling disputes; and in 1998, it enacted the Alternative Dispute Resolution Act, requiring district courts to establish ADR programs. More than half the states have also established ADR programs. Corporations and other private institutions have also pioneered their own mechanisms for resolving disputes without recourse to the courts.

Alternatives in Dispute Resolution

Alternative dispute resolution encompasses a wide range of forums and processes. Although considerable differences exist among ADR programs, most involve either arbitration or mediation.

Arbitration

Voluntary Arbitration After a period in the major leagues, a baseball player who cannot agree with his team on a salary is eligible to take the dispute to arbitration. The player proposes a salary that he believes is fair and offers arguments and evidence for his position. The team submits a different figure and supports its position. The arbitrator then chooses one of the two figures, and both parties are bound by that decision.

Baseball’s system of salary arbitration reveals the basic features of arbitration: A dispute is submitted to a neutral third party who hears arguments, reviews evidence, and renders a decision. As the example illustrates, voluntary arbitration is most often used to resolve labor disputes. In recent years, however, it has also been employed to settle commercial disputes in various industries, including construction and insurance.[37]

Although the arbitrator plays a quasi-judicial role, voluntary arbitration differs from litigation in crucial respects. First, voluntary arbitration can occur only if both parties have consented, usually by contract, to submit their disputes to arbitration. Baseball’s system of salary arbitration, for example, resulted from a collective bargaining agreement between the players’ union and the team owners. Second, the arbitrators in voluntary arbitration are selected and paid by the parties. Agreement between the parties determines whether there shall be a single arbitrator or a panel of arbitrators, the scope of their authority, and how they shall be selected. Third, voluntary arbitration proceeds according to ground rules negotiated by the parties. Usually, formal rules of evidence and procedure are dispensed within arbitration. This procedural informality simplifies and speeds the process. Fourth, voluntary arbitration promotes timely decision making. In simple cases, the arbitrator may render an immediate decision. Even in complex cases, arbitrators, because they are not obliged to write opinions, announce their decisions quickly, usually within 30 days of the conclusion of the arbitration hearing. Yet, as Box 7.3 shows, the rapid expansion of arbitration to resolve disputes has become controversial.

Box 7.3 The Perils of Mandatory Arbitration

You may not realize it, but many consumer contracts you enter into contain pre-dispute arbitration clauses, mandating that if disputes do arise with the company about its product, those disputes must be resolved by arbitration rather than by taking them to court. For example, Consumer Reports found that nine out of 10 brands of microwave ovens, six out of 10 vacuum cleaners, and five out of 10 laptops required arbitration of dispute. Many employment contracts likewise mandate arbitration of disputes as a condition of employment—among companies with 1000 or more employees, almost two-thirds impose mandatory arbitration requirements.

Proponents of arbitration claim it promotes a faster, cheaper, and fairer resolution of disputes. But critics insist that arbitration disadvantages complainants. Because the regular rules of judicial procedure and evidence do not apply in arbitration, and there is no appeal from an arbitrator's decisions, complainants have less likelihood of success. Even if they do prevail, the awards they can receive is reduced. Arbitration also limits public awareness of corporate abuses because the proceedings are private and often confidential. Finally, because arbitration typically does not allow class action complaints, it reduces the likelihood that small-dollar claims will be brought at all. According to one study, an estimated 825 million consumer arbitration agreements were in force in 2018, yet only about 7000 arbitration cases were actually brought.

State efforts to curtail forced arbitration have been blocked by the U.S. Supreme Court. In *AT&T Mobility LLC v. Conception* (2011) the justices by a 5–4 vote struck down a California law that sought to prevent arbitration clauses from restricting class-action lawsuits, ruling that the state statute was preempted by the Federal Arbitration Act of 1925. Congressional efforts to address the issue have stalled. In 2019 the House of Representatives passed the Forced Arbitration Injustice Repeal (FAIR) Act, which would have banned mandatory arbitration provisions in consumer contracts, but the bill failed in the Senate. The legislation was reintroduced in 2022 but again languished in the Senate.

Direct action against companies has proved more successful. In 2018, 20,000 Google employees walked out of their offices to protest the company's handling of sexual misconduct complaints, and a week later the company ended the use of forced arbitration in sexual harassment and assault suits. In 2020 Wells Fargo announced it was ending the use of forced arbitration in sexual harassment cases due to pressure from stakeholders.

SOURCES: Scott Medintz, "Forced Arbitration: A Clause for Concern," Consumer Reports, at: www.consumerreports.org/mandatory-binding-arbitration/forced-arbitration-clause-for-concern/; and Katherine V.W. Stone & Alexander J.S. Colvin, "The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights,' *Economic Policy Institute* 1, 5 (Dec. 7, 2015).

Court-Annexed Arbitration Court-annexed arbitration might also be called compulsory arbitration.[38] The court assigns selected civil cases to arbitration, usually those involving relatively small sums of money, as a precondition to or substitute for trial. For example, Nevada requires that all civil actions that arise out of automobile accidents and involve less than $15,000 be submitted to arbitration. The arbitrator, usually designated by the state, hears arguments, examines evidence, and renders a decision, applying the same legal standards a judge would apply. If the parties accept the arbitrator's ruling, it becomes the court's judgment in the case. If either party objects to the ruling, it can demand a trial of the case; thus, the arbitrator's decision is not binding. In most jurisdictions, however, financial penalties discourage frivolous appeals of arbitrators' rulings. In Colorado, for example, unless the party demanding trial improves its position by more than 10 percent, it must pay up to $1000 of the costs of the arbitration proceeding. Since 1952, when the first program was introduced in Pennsylvania, more than half the states and most federal district courts have instituted court-annexed arbitration programs.

Mediation Mediation attempts to resolve disputes by "assist[ing] the disputants to reach a voluntary settlement of their differences through an agreement that defines their future behavior."[39] In divorce mediation, for example, the agreement may resolve such contentious matters as the division of marital property, child support payments, and visitation rights. In neighborhood disputes, the agreement may specify the actions that each disputant will take or avoid in the future.

Mediators do not render authoritative decisions, like arbitrators or judges at trial do; they merely facilitate settlements between the disputants. The success of their efforts thus depends on their interpersonal skills and their ability to win the trust and cooperation of the disputants. Advocates of mediation view this lack of coercion as an advantage. Requiring disputants to become actively involved in resolving the dispute ensures that the outcome will be one that is acceptable to both parties.

Mediators promote settlement largely by fostering a productive negotiating climate in which issues are addressed in an orderly fashion, hostility is controlled, and the need for compromise is recognized. They may also play a more active part in the negotiations, obliging the disputants to clarify their objectives, offering suggestions for settlement, and translating the agreements reached into a written document.

In recent years, government programs have promoted mediation for resolving disputes between divorcing couples and within neighborhoods. Many states now offer divorce mediation to promote settlements for the division of property, child custody, and visitation rights. California has mandated mediation in all such instances. Although exact figures are unavailable, experts have estimated that there were 28,000 divorce mediations in 1980 and more than 34,000 a year later, a rise of almost 25 percent.[40] Similar growth has occurred in the use of mediation to deal with neighborhood disputes. In 1975, there were only 11 neighborhood justice centers nationwide; a decade later, there were 182, and the number has continued to increase.[41] Most of the centers employ mediators to resolve disputes brought by neighborhood residents or referred by police, local courts, or prosecutors' offices.

Does ADR Work?

Legal reformers insist that ADR provides fast and inexpensive justice, and the rapid expansion of programs in recent decades suggests that their arguments have been persuasive. Nonetheless, critics insist that the claims for ADR seem contradictory. Can it really promote greater access to justice and, at the same time, reduce the demands on the courts? Beyond this, they argue, ADR is a class-based reform that shunts the disputes of the average citizen to lesser tribunals, reserving the courts for the concerns and disputes of the elite.

Critics also charge that, because ADR emphasizes compromise and accommodation, it disarms victims of injustice who insist on the full vindication of their rights. In fact, ADR's emphasis on informal proceedings tends to reinforce unequal power relations by denying to poor and disadvantaged members of society the due process protections of court proceedings and the equalizing assistance of representation by a lawyer.[42]

These are serious charges. Let us look at the actual effects of ADR, focusing on its consequences for access to justice, the caseloads of the courts, the costs of securing justice, and the quality of justice obtained by those whose disputes are addressed through ADR.

Access to Justice Many ADR programs have been designed to increase access to justice, especially for those involved in minor disputes. Such programs do not charge for services or require lawyers. They may hold hearings at times convenient to all disputants, such as evenings or weekends, and may provide multilingual staffs to serve non-English-speaking disputants. Nevertheless, ADR programs have not attracted large numbers of disputants who had been unwilling to bring their disputes to court. Most cases come to ADR programs on referral from courts or other institutions rather than from disputants directly seeking their services.[43] Thus, ADR programs have not substantially enhanced access to justice.

Effects on Court Caseloads If most disputes come to ADR programs on referral, this suggests that the programs may relieve caseload pressures on the courts. Some proponents of ADR see this as its prime advantage. Although ADR programs have reduced court caseloads somewhat, their impact has been limited. In part, this reflects the small size of most ADR programs. An ABA survey found that 60 percent of ADR programs received fewer than 500 referrals per year, and only 4 percent received more than 5000 referrals.[44] Because most civil cases are settled prior to trial, the parties using ADR might not have gone to trial, even if they had not been referred to an ADR program. Finally, ADR programs may not conclusively resolve the cases referred to them. When disputants cannot reach an agreement in mediation, they may take their dispute to court. When an arbitrator renders a decision in court-annexed arbitration, the losing party has the option of taking the case to court, although relatively few elect to do so. In sum, ADR programs have had only a limited impact on court caseloads.

The Costs of Justice A major claim of ADR is that it reduces the costs to government of dispensing justice and to disputants of obtaining it. ADR eliminates judges and juries, streamlines procedures, and disposes of disputes more quickly than courts can. One study found that it cost about $175 to hear a case but only about $76 to process a case through arbitration.[45] Disputants benefit not only from the greater efficiency of ADR proceedings but also, in most instances, from the opportunity to pursue their claims without incurring the cost of a lawyer. However, insofar as cases are referred to ADR that would have settled rather than gone to trial, the financial advantages are limited.

The Quality of Justice The absence of judges, lawyers, and jurors, however, raises a serious question: Are disputants under ADR receiving "second-class justice"? Critics contend that government uses ADR to get rid of working-class citizens and their disputes rather than give them the serious consideration they deserve. Indeed, studies of mediation programs that deal with neighborhood problems have found that complainants come disproportionately from the lower middle class.[46] However, not all ADR programs share this class character. Divorce-mediation programs draw disputants from all social strata, as do court-annexed arbitration programs.

Critics also contend that government gives first-class treatment to business cases, while palming off interpersonal disputes to ADR. Undoubtedly, courts are eager to avoid involvement in interpersonal disputes, which court personnel often refer to as "junk cases," complaining that they "don't belong here." This reluctance to deal with interpersonal disputes derives, at least in part, from the recognition that courts are ill-equipped to resolve such disputes. Moreover, ADR may respond to the desire for more harmonious relationships within society. The real question is whether mediation and arbitration do a better job in resolving disputes than courts do.

Legal scholars have attempted to answer that question by surveying disputants' views about the fairness of the process and outcomes under ADR.[47] Their surveys reveal widespread satisfaction with how disputes were handled and resolved. The responses are particularly striking when compared with litigants' evaluations of court processes. In divorce mediation, for example, in which participants were involved both with courts and with mediation, 98 percent of those who had success in mediation expressed satisfaction with the process, as did 57 percent of those who had no success; but only 36 percent were satisfied with the court processes. Similar results were obtained when disputants were questioned about how effective judicial rulings and mediation agreements were in promoting long-term solutions to their disputes. Surveys reveal that mediation promotes greater understanding, reduced anger, and improved relationships.

Although these findings suggest the superiority of mediation and arbitration to adjudication, at least for certain types of cases, they do not necessarily demonstrate that cases should be resolved by ADR programs rather than by courts. Most cases that come to the courts are, in fact, settled rather than adjudicated. Judges also engage in mediation to settle cases, as the discussion of the Agent Orange case showed. Thus, even before ADR was widely introduced, the boundaries between litigation and other forms of dispute resolution had blurred.

CONCLUSIONS

"As a litigant," a famous judge once wrote, "I should dread a lawsuit beyond almost anything else short of sickness and death."[48] Yet Americans file millions of lawsuits each year. This is not, evidence suggests, because Americans are unusually litigious. But in a complex, populous society like the United States, disputes are bound to arise; and advances in technology have transformed expectations of justice, making people less willing to accept injuries as fated or as "nobody's fault." Courts provide a venue for resolving those disputes and redressing those injuries.

Litigation, however, is only one among a number of options for dealing with grievances. As we have seen, most grievances do not become disputes, and most disputes do not become court cases. Psychological and financial costs and uncertainty discourage potential litigants from filing suit. These costs, however, do not fall evenly on all segments of the population. The differences in the types of civil cases brought to the courts for resolution suggest that the costs weigh more heavily on one-shotters than on repeat players.

Even when litigants do file civil suits, their cases are far more likely to be settled than adjudicated. What unites such reforms of the civil justice system as liberalized rules for discovery, pretrial conferences, and the ADR movement is the emphasis on promoting settlement and discouraging trials. Indeed, trials seem an anomaly, occurring only when the various mechanisms designed to produce a consensual solution have failed. In this respect, the system of civil justice in the United States closely resembles the system of criminal justice, with its emphasis on plea bargaining rather than trial. The question remains whether these systems serve the interests of justice.

NOTES

1 Quoted in Peter H. Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* (Cambridge, MA: Belknap Press, 1986), p. 256. The description of the Agent Orange litigation relies on Schuck's account.

2 Quoted in ibid., p. 45.

3 Quoted in ibid., p. 85.

4 Quoted in ibid., p. 68.

5 Compare Deborah L. Rhode, *Access to Justice* (Oxford: Oxford University Press, 2004) with Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (New York: Truman Talley Books, 1991).

6 Richard E. Miller and Austin Sarat, "Grievances, Claims, and Disputes: Assessing the Adversary Culture," *Law and Society Review* 15 (1980–1981): 524–565.

7 See Lawrence M. Friedman, *Total Justice* (New York: Russell Sage Foundation, 1985), part 1; Jethro K. Lieberman, *The Litigious Society* (New York: Basic Books, 1981), chap. 1.

8 Barbara A. Curran, *The Legal Needs of the Public* (Chicago, IL: American Bar Foundation, 1977), pp. 141–142.

9 Quoted in Kristin Bumiller, *The Civil Rights Society: The Social Construction of Victims* (Baltimore: Johns Hopkins University Press, 1988), p. 90.

10 Herbert Kritzer, "To Lawyer or Not to Lawyer: Is That the Question?" *Journal of Empirical Legal Studies* 5 (December 2008): 875–906.

11 Quoted in Bumiller, *The Civil Rights Society*, p. 52.

12 Charles Alan Wright, *Law of Federal Courts*, 3rd ed. (Eagan, MS: West Publishing, 1976), p. 293.

13 Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (Chicago, IL: University of Chicago Press, 1990), p. 87.

14 Olson, *The Litigation Explosion*, p. 119.

15 Quoted in Robert E. Litan, "Speeding Up Civil Justice," *Judicature* 73 (October–November 1989): 162.

16 Quoted in Laurie P. Cohen and Alex M. Freedman, "Tobacco Plaintiffs Face a Grilling," *Wall Street Journal*, February 11, 1993, A–6.

17 Herbert M. Kritzer, "Adjudication to Settlement: Shading in the Gray," *Judicature* 70 (October–November 1986): 161–165.

18 Wayne D. Brazil, *Settling Civil Suits: Litigators' Views about Appropriate Roles and Effective Techniques for Federal Judges* (Chicago, IL: American Bar Association Press, 1985), pp. 45–46.

19 See the website of the federal judiciary at http://www.uscourts.gov.

20 Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," *Law and Society Review* 9 (Fall 1974): 97–107.

21 Lenore J. Weitzman, *The Divorce Revolution* (New York: Free Press, 1985), p. x. Later studies have tempered Weitzman's conclusions: Herbert Jacob, *Silent Revolution: The Transformation of Divorce Law in the United States* (Chicago, IL: University of Chicago Press, 1988); Stephen D. Sugarman and Herma Hill Kay, eds., *Divorce Reform at the Crossroads* (New Haven, CT: Yale University Press, 1990).

22 Weitzman, *The Divorce Revolution*, p. x.

23 Galanter, "Why the 'Haves' Come Out Ahead," p. 98.

24 Craig McEwen and Richard Maiman, "Small Claims Mediation in Maine: An Empirical Assessment," *Maine Law Review* 33 (1981): 237–268. For a cautionary perspective, see Neil Vidmar, "The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation," *Law and Society Review* 18 (1984): 515–550.

25 Robert Roper and Joanne Martin, "Jury Verdicts and the 'Crisis' in Civil Justice: Some Findings from an Empirical Study," *Justice System Journal* 11 (Winter 1986): 321–348.

26 Quoted in Marc Galanter, "The Day after the Litigation Explosion," *Maryland Law Review* 46 (1986): 3.

27 Quoted in Richard D. Catenacci, "Hyperlexis or Hyperbole: Subdividing the Landscape of Disputes and Defusing the Litigation Explosion," *Review of Litigation* 8 (Fall 1989): 320.

28 Quoted in Galanter, "Day after the Litigation Explosion," pp. 3–4.

29 Quoted in Gregory B. Butler and Brian D. Miller, "Fiddling while Rome Burns: A Response to Dr. Hensler," *Judicature* 75 (February–March 1992): 251.

30 Marc Galanter, "Law Abounding: Legalization around the North Atlantic," *Modern Law Review* 55 (January 1992): 1–25.

31 Herbert M. Kritzer, "Propensity to Sue in England and the United States: Blaming and Claiming in Tort Suits," *Journal of Law and Society* 18 (Winter 1991): 400–427. Data on civil filings in American state courts are drawn from State Court Caseload Statistics, available at the website of the National Center for State Courts, http://www.courtstatistics.org.

32 David W. Neubauer, “Are We Approaching Judicial Gridlock? A Critical Review of the Literature,” *Justice System Journal* 11 (Winter 1986): 365.

33 Galanter, “Day After the Litigation Explosion,” p. 10.

34 Stephen Daniels, “Ladders and Bushes: The Problem of Caseloads and Studying Court Activities over Time,” *American Bar Foundation Research Journal* (1984): 751–796; Wayne V. McIntosh, *The Appeal of Civil Law: A Political-Economic Analysis of Litigation* (Chicago, IL: University of Illinois Press, 1990), chap. 7.

35 Galanter, “Day after the Litigation Explosion,” p. 5, and McIntosh, *Appeal of Civil Law*, especially p. 166, table 7.4.

36 Representative of this viewpoint is Stephen B. Goldberg, Eric D. Green, and Frank E. A. Sander, *Dispute Resolution* (Little, Brown, 1985). For a dissenting view, see Christine B. Harrington, *Shadow Justice: The Ideology and Institutionalization of Alternatives to Court* (Westport, CT: Greenwood Press, 1985), chap. 3.

37 John W. Cooley, “Arbitration vs. Mediation—Explaining the Differences,” *Judicature* 69 (February–March 1986): 263–269.

38 Deborah Hensler, “What We Know and Don’t Know about Court Administered Arbitration,” *Judicature* 69 (February–March 1986): 270–278.

39 Susan M. Leeson and Bryan M. Johnston, *Ending It* (Scotch Plains, NJ: Anderson Publishing, 1988), chap. 6.

40 Kenneth Kressel, *The Process of Divorce: How Professionals and Couples Negotiate Settlements* (New York: Basic Books, 1985), p. 182.

41 Daniel McGillis, *Community Dispute Resolution Programs and Public Policy* (Washington, DC: National Institute of Justice, 1986), p. 7.

42 Works critical of alternative dispute resolution include Jerold Auerbach, *Justice Without Law?* (Oxford: Oxford University Press, 1984); and Penelope E. Bryan, “Killing Us Softly: Divorce Mediation and the Politics of Power,” *Buffalo Law Review* 40 (May 1992): 443–523.

43 Merry, *Getting Justice and Getting Even*, pp. 182–188.

44 McGillis, *Community Dispute Resolution Programs and Public Policy*, p. 77.

45 Hensler, “What We Know and Don’t Know about Court Administered Arbitration,” p. 274.

46 Merry, *Getting Justice and Getting Even*, pp. 182–188.

47 McGillis, *Community Dispute Resolution Programs and Public Policy*, pp. 61–67.

48 Learned Hand, “The Deficiencies of Trials to Reach the Heart of the Matter,” in *Association of the Bar of the City of New York, Lectures on Legal Topics* (New York: Macmillan, 1926), p. 105.

8

Judicial Decision Making

In *Bowers v. Hardwick* (1986), the Supreme Court upheld a Georgia statute that criminalized sodomy, rejecting a challenge by a gay man that the law violated his constitutional right to autonomy in his intimate associations with others. But 17 years later, in *Lawrence v. Texas* (2003), the Court overruled *Bowers* and struck down a Texas statute that made it a crime for two persons of the same gender to engage in anal intercourse.[1] What accounts for the shift in the Court's position?

Changes in the Supreme Court's legal analysis provide one possible explanation for the differing outcomes in the two cases. Speaking for the majority in *Bowers v. Hardwick*, Justice Byron White denied that the Constitution conferred "a fundamental right upon homosexuals to engage in sodomy." To recognize such a right, he noted, would require invalidation of "the laws of the many States that still make such conduct illegal and have done so for a very long time." These laws were important, he insisted, because they showed that historically there was no right to engage in such conduct and that therefore the conduct was not protected by the Constitution. White concluded that the decision whether or not to have such laws was to be made by the people's representatives, not by unelected judges.

But speaking for the majority in *Lawrence v. Texas*, Justice Anthony Kennedy maintained that the Court in *Bowers* had misconceived what was at issue in the case. He argued that the liberty protected by the Constitution encompassed intimate conduct such as was outlawed by Texas, because the personal choices associated with such conduct are "central to personal dignity and autonomy." Whereas Justice White looked to historical practice to determine the scope of the Constitution's protections, Justice Kennedy looked to contemporary practices both in the United States, where the number of states with sodomy statutes had

DOI: 10.4324/9781003440055-10

declined since *Bowers*, and in other countries that no longer regulated homosexual activity. Whereas Justice White worried about "the judiciary tak[ing] to itself further authority to govern the country without express constitutional authority," Justice Kennedy celebrated the right of "persons in every generation" to invoke constitutional principles "in their own search for greater freedom." Thus, a legal explanation for the divergent results in *Bowers* and *Lawrence* would highlight the Court's changing understanding of how one identifies the liberties protected by the Constitution and of what role the justices should play in vindicating them.

Nonlegal factors provide an alternative explanation for the differing outcomes in the two cases. One such factor might be changes in the composition of the Supreme Court. Of the five justices who made up the majority in *Bowers*, three had retired by the time the Court decided *Lawrence*. Of the five justices appointed between 1986 and 2003, three voted to overrule *Bowers*. What may have changed was not the law but who was interpreting it. A second nonlegal factor, changes in societal views, might also be pertinent. As Justice Benjamin Cardozo put it, "The great tides and currents which engulf the rest of men do not turn aside in their course and pass judges by."[2] Between the rulings in *Bowers* and *Lawrence*, American public opinion became more accepting of same-sex relationships, and this too might have influenced the Court's change in perspective. A third nonlegal factor—namely, the political and social attitudes of the justices themselves—could also have played a part. According to Justice Antonin Scalia, who dissented in *Lawrence*, the ruling was "the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda," which he characterized as "directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct." Thus, it might be attitudinal changes not in the society at large but in the justices' reference groups that proved decisive.

These two accounts present strikingly different explanations of why the Supreme Court's position changed from *Bowers* to *Lawrence*. The first account presents judges as primarily concerned with the accurate interpretation of the law. Thus, it emphasizes the legal reasoning that the Court offered in support of its decisions. It explains the shift in the Court's rulings in terms of changes in the justices' understanding of the legal issue presented, in their interpretation of the Constitution, and in their perspective on the role that the Court should play in resolving controversial issues. The second account, in contrast, portrays judges as concerned with advancing what they perceive as good policy and with responding to groups whose approval they value. It thus emphasizes personnel changes on the Court, shifts in public opinion, and the values and attitudes of the justices rather than legal factors.

These accounts illustrate distinct approaches to understanding judicial decision making. The first approach, which I shall call the legal perspective, distinguishes judicial decision making from the decision making of other political actors, such as legislators and executives. According to this perspective, judicial decision making is distinctive because judges are expected to decide cases according to law, rather than on the basis of personal predilection or public opinion, and because they must justify their rulings through a process of legal reasoning. Responding to this expectation, judicial decisions represent the judges' best understanding of what the law requires.

The second approach, which I shall call the political perspective, insists that judicial decision making closely resembles decision making by other political actors. According to this view, extralegal factors are decisive in judicial decision making: the attitudes of the judges, their conceptions of how they should behave, and the institutional context in which they operate. Although judges must justify their rulings on the basis of law, law merely provides the justification for judicial decisions; it does not substantially constrain judicial choice.

This chapter addresses these perspectives on judicial decision making. It focuses on decision making in appellate courts, because those courts—in contrast with trial courts—are primarily concerned with analyzing legal questions and usually present their analyses in written opinions.

THE LEGAL PERSPECTIVE

The Phases of Judicial Decision Making

According to the legal perspective, judicial decision making involves two phases: discovery and justification. Discovery involves the judge's initial determination of how a case should be resolved; justification involves the elaboration of the legal bases for the decision in a written opinion.[3] These two phases are interrelated. In the discovery phase, the judge may be said to "intuit" the proper resolution of the case—that is, to arrive at the resolution without proceeding through a step-by-step reasoning process. This judicial intuition differs from the intuitive judgment of the average person, because the judge's intuition is a professional judgment, informed by his or her legal training and experience on the bench. Thus, the legal bases for resolving the case play a role in the discovery phase, as well as in the justification phase of judicial decision making.[4]

In the justification phase, the judge presents the bases for his or her decision in a written opinion. Because judges do not reach their decisions by a process of formal reasoning, the opinions that judges write do not describe the thinking processes by which they arrive at their decisions. Nevertheless, the requirement that judges publicly justify their rulings is crucial, because it forces them to examine whether there are persuasive legal bases supporting the decision they have reached. If there are, they explain those bases in the written opinion. If there are not, they must modify their initial position to bring it in line with the weight of legal authority.

The Tools of Judicial Decision Making

To decide cases, judges must determine the applicable law and its meaning and apply the law to the facts of the case. This may require them to consult a variety of legal or extralegal materials. Three resources are particularly important.

The Legal Text Judicial decision making begins with the text of the applicable constitution, statute, or administrative regulation. (In cases involving the common law, of course, there is no text, because there is no legal enactment to interpret.) The text itself is the fundamental authority, because the judge's function is to give effect to the law enacted by the constitution maker or lawmaker. In addition, the words used in an enactment constitute the best guide to its meaning. It was with this in mind that Justice Felix Frankfurter offered his famous three-step guide to statutory interpretation: (1) read the statute; (2) read the statute; (3) read the statute![5]

If the meaning of a law is clear on its face, then judges need search no further and can merely apply it in the case before them. As the Supreme Court has noted: "If the words convey a definite meaning, which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning apparent on the face of the instrument, must be accepted."[6]

But often the meaning of a law is not immediately obvious; indeed, litigation arises precisely because it is possible to disagree about the meaning of the law. Consider, for example, the Mann Act—also known as the White Slave Traffic Act—enacted by Congress in 1910. The Mann Act makes it a felony to "transport or cause to be transported in interstate commerce any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose." While the meaning of "prostitution" is plain, the same cannot be said for the other terms in the act: "debauchery" and "any other immoral purpose." Suppose a robber paid for a woman's airline ticket so that she could join him in robbing a bank. Assuming bank robbery is immoral, has he violated the Mann Act?

Looking merely at the text of the Mann Act, a judge would answer that the robber had not violated the law. To understand why, consider how judges interpret legal texts. They begin with the presumption that the enactment is a coherent effort to accomplish some purpose. Therefore, determining the general purpose of a statute or other enactment is crucial to clarifying the meaning of its various parts. In our hypothetical case, for example, the language of the Mann Act—"prostitution" and "debauchery"—suggests that it was designed to prevent the transportation of women for illicit sexual activity. The law did not, then, forbid the transportation of women for bank robbery. Judges also read the words in a legal enactment in context, not just for their dictionary meaning. Justice Oliver Wendell Holmes explained why context is crucial: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content, according to the circumstances and the time in which it is used."[7] This context may serve to give specificity to the general language in an enactment. Thus, in the context of the Mann Act, the meaning of "any immoral purpose" is clarified by its appearance in juxtaposition to other language ("prostitution" and "debauchery") dealing with sexual immorality.

As our example illustrates, recurrence to the legal text means more than simply reading the words. The judge examines the text as an integrated whole, comparing and reconciling its various provisions, and clarifying its general language through analysis of the context in which the phrases appear. If the legal text was written at some time in the past, as is the case with the U.S. Constitution, the judge seeks to find the meaning that the words had at the time at which they were adopted. This reliance on "original meaning"—often referred to as "originalism"—is controversial, at least when constitutional interpretation is involved (see Box 8.1)

Legislative History If textual analysis does not suffice to answer the legal questions in a case, a judge may also consult the "legislative history" of the enactment—that is, materials generated in the course of adopting the statute or constitutional provision. To determine the meaning of a statute, a judge may trace its evolution through the records of committee hearings, committee reports summarizing the legislation and its purposes, and statements of legislators during floor debates. In interpreting provisions of the U.S. Constitution, a judge may consult James Madison's *Notes* on the debates at the Constitutional Convention, the debates in the conventions called to ratify the proposed Constitution, the *Federalist Papers*, and other commentary contemporaneous with the ratification process.[8] By mining the legislative history of an enactment, a judge may better determine the purposes of the enactment and how its authors believed it should be interpreted.

Legal scholars have long debated the desirability of consulting legislative history. Courts in Great Britain have steadfastly refused to consider legislative materials relating to a statute's passage in determining Parliament's intent. At least in recent years, however, some courts in the United States have regularly looked to legislative history in interpreting

Box 8.1 The Originalism Debate

How does one discover the meaning of constitutional provisions? Increasingly, justices of the U.S. Supreme Court—and judges on other courts as well—have subscribed to an approach known as originalism, which takes as authoritative the meaning of provisions at the time of their adoption. Thus the meaning of the Second Amendment right to bear arms is, for originalists, the meaning it had for the Founding generation. As the Supreme Court stated in 2022 in striking down a New York law that restricted licenses for carrying firearms outside the home, "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."

Some originalists emphasize what the delegates to the Constitutional Convention of 1787 intended when they drafted the document. They therefore look to the convention debates and to sources such as *The Federalist Papers*—essays written by Alexander Hamilton, James Madison, and John Jay during the ratification debates—to determine the document's meaning. Other originalists emphasize the understanding of those who ratified the Constitution, that is, the delegates to the ratification conventions who by their votes gave the document legal force. Still other originalists emphasize what they call the "original public meaning" of the Constitution, that is, what its words would have meant to members of the public at the time they were written. Those who embrace this textualist emphasis look to dictionaries and other Founding-era documents to ascertain what Justice Antonin Scalia has called "the then customary meaning of the words and phrases in the Constitution."

The Court's embrace of originalism is controversial. Skeptics both on and off the bench claim that discovering the original meaning of provisions and what their contemporary application should be is often impossible. They also insist that the meaning of the Constitution should emerge from a consideration of the nation's full constitutional development, rather than being fixed at a single point in time when it was first adopted. Noting that the leading originalist judges are often conservatives, some even charge that their adherence to originalism is a pose and that they are actually deciding cases based on their political views.

Originalists reject these criticisms, insisting that consistent adherence to this single interpretive approach serves to rein in judicial policymaking, whereas use of multiple interpretive approaches allows judges too much discretion. Whatever the validity of the competing viewpoints, originalism has become increasingly influential on the Supreme Court. Indeed, in her Senate confirmation hearings, Elena Kagan, soon to join the liberal wing of the Court, nonetheless acknowledged: "We are all originalists."

statutes. Proponents believe that legislative history helps judges resolve ambiguities and interpret enactments in line with the intentions of those who adopted them. For example, a judge interpreting the Mann Act could consult the congressional debates surrounding its adoption to determine how its sponsors understood the terms "debauchery" and "other immoral purposes." Even more important, by consulting legislative history, a judge could ensure that his or her interpretation of the law's purposes coincides with the intentions of the legislators. This is crucial, because the legislature's power to enact law necessarily entails the power to prescribe the authoritative meaning of the law that it enacts.[9]

Those who oppose the use of legislative history deny that one can ascribe an intention to groups such as legislative bodies or constitutional conventions. They note that statutes and constitutional provisions are the product of group deliberations. Many of those who vote for a measure never state their view of what it means or how it should be interpreted. Those who do speak may do so primarily to influence the judicial interpretation of the provision. There is no reason to assume, however, that the views of those who speak during legislative debates are representative. Legislators may have quite different understandings of the enactments they adopt. Opponents argue that, given the unreliability of legislative history, judges should ignore it in favor of analysis of the text of the enactment and judicial rulings interpreting it.[10]

Precedent A precedent is an earlier judicial decision that might be used as a basis for deciding a current case. In a hierarchical legal system, lower court judges are obliged to decide cases in line with the precedents established by higher courts. For example, a ruling by the Minnesota Supreme Court on a matter of Minnesota state law is authoritative and binding on judges in the state's trial courts. A ruling by a court of similar rank, however, does not constitute authoritative precedent in the sense that it need not be followed. For example, a federal court of appeals may interpret a federal law in a particular way, but another federal court of appeals is not obliged to accept the first court's interpretation of the law. Nor, in the United States, is a court legally obliged to adhere to its own prior decisions. The Supreme Court, for example, may overrule its earlier decisions interpreting the Constitution or federal statutes. We saw this at the beginning of the chapter when the Court in *Lawrence v. Texas* overruled *Bowers v. Hardwick*.

Of course, even when precedents are not authoritative, they may still be persuasive. Thus, a federal court of appeals may decide, after learning how another appeals court has interpreted a federal law, that the interpretation was correct and adopt it. Or the Supreme Court may conclude that its earlier rulings interpreting, say, the Eighth Amendment's ban on cruel and unusual punishments were correct and use them to justify its ruling in a current case. Similarly, judges in Alabama or Oregon may seek guidance in the rulings of judges from other states in interpreting the common law.

The system of case law in the United States and Great Britain relies heavily on the doctrine of precedent, or *stare decisis*, which states that cases should be decided today as they were decided in the past. Indeed, from 1898 to 1966, the House of Lords, the highest court in Great Britain, subscribed to a strict doctrine of precedent, holding itself absolutely bound by its earlier decisions. Although courts in the United States have never embraced this position, they have recognized that strong arguments support judicial adherence to precedent and that departures from precedent therefore require justification.

The doctrine of precedent is particularly important in resolving cases at common law, because there is no legal text or legislative history on which to base decisions. However, *stare decisis* also operates in statutory interpretation and, to a lesser extent, in constitutional adjudication. Box 8.2 reveals the reasons usually offered for adherence to precedent, as well as reasons for departure from it.

1. *Predictability.* Adherence to precedent assures a certainty about results that would otherwise be difficult to obtain. This certainty enables people to predict the legal consequences of their actions and to act accordingly. For example, I am more willing to enter into a contract if I can be sure that the law will support me if the other party violates the contract. And I can have that assurance if the law currently upholds contractual obligations and judges adhere to precedent in contract law.
2. *Reliance.* Just as people rely on promises in ordering their affairs, so also do they rely on judicial decisions authoritatively establishing the meaning of the law, and they gauge their behavior accordingly. A departure from precedent, then, is analogous to breaking a promise, so the legal system should give effect to the expectations that it has itself engendered.
3. *Equality.* Equality before the law, or uniformity of treatment, is an essential element in a just legal system. The doctrine of precedent obliges judges to decide similar cases in the same way. By doing so, it reduces the discretion of judges, thereby ensuring that extraneous factors (e.g., the race, religion, gender, or social status of the parties) do not influence decisions.
4. *Efficiency.* The doctrine of *stare decisis* provides judges with a quick and easy basis for justifying their rulings and thus relieves them of the burden of returning to first principles in each case. Instead of having to "reinvent the wheel," judges can turn to the experience and wisdom of earlier judges. This in turn promotes the timely disposition of cases.

As Box 8.2 indicates, the arguments for *stare decisis* can be countered by arguments against strict adherence to precedent. Moreover, adherence to

Box 8.2 Perspectives on Precedents

"Precedents only prove what was done, but not what was well done."
Thomas Hobbes, English philosopher

"It is better that the law should be certain than that every judge should speculate upon improvements in it."
Lord Eldon, English jurist

"The question whether the doctrine of *stare decisis* should be adhered to … is always a choice between relative evils. When it appears that the evil resulting from a continuation of the accepted rule must be productive of greater mischief to the community than can possibly ensure from disregarding previous adjudications on the subject, courts have frequently and wisely departed from precedent."
Chief Justice Arthur Vanderbilt, New Jersey Supreme Court

"The force of precedent in the law is heightened by an additional factor: that curious, almost universal sense of justice which urges that all men are properly to be treated alike in like circumstances."
Karl Llewellyn, law professor

"This search for a static security—in the law or elsewhere—is misguided. The fact is that security can only be achieved through constant change, through the wise discarding of old ideas that have outlived their usefulness, and through the adapting of others to current facts."
Justice William O. Douglas, U.S. Supreme Court

"The labors of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."
Chief Justice Benjamin Cardozo, New York Court of Appeals (later on the U.S. Supreme Court)

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."
Justice Oliver Wendell Holmes, Massachusetts Supreme Judicial Court (later on the U.S. Supreme Court)

"Stare decisis has no bite when it means merely that a court adheres to a precedent that it considers correct. It is significant only when a court feels constrained to stick to a former ruling although the court has come to regard it as unwise or unjust."
Judge Jerome Frank, U.S. Court of Appeals

"Proper application of *stare decisis* required an assessment of the strength of the grounds on which *Roe* was decided … *Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences."

Justice Samuel Alito, opinion of the Court in *Dobbs v. Jackson Women's Health Organization* (2022), overruling *Roe v. Wade*

"Weakening *stare decisis* creates profound legal instability, makes the Court appear not restrained but aggressive, not modest but grasping [and so] takes aim at the rule of law."

Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan, dissenting in *Dobbs v. Jackson Women's Health Organization*

SOURCES: Thomas Hobbes, *A Dialogue between a Philosopher and a Student of the Common Laws of England*, Joseph Cropsey, ed. (Chicago: University of Chicago Press, 1971), p. 129; Lord Eldon: *Sheddon v. Goodrich*, 8 Ves. 497; Arthur Vanderbilt: *Fox v. Snow*, 76 A.2d 877 (N.J. 1950); Karl Llewellyn, "Case Law," *Encyclopedia of the Social Sciences* (New York: Macmillan, 1930), 3: 249; William O. Douglas, "Stare Decisis," *Columbia Law Review* 49 (1949): 735; Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven, CT: Yale University Press, 1921), pp. 149–150; Oliver Wendell Holmes, "The Path of the Law," *Harvard Law Review* 10 (1897): 439; *United States v. Shaugnessy*, 234 F.2d 715 (1955); and *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ (2022).

precedent is not as easy as it may initially appear. To understand why, consider the process of judicial reasoning.

Legal Reasoning as Deductive Reasoning

In 1984, Gregory Johnson was convicted of violating a Texas law prohibiting flag desecration after he burned an American flag as part of a political protest. He appealed his conviction to the U.S. Supreme Court, contending that the Texas statute impinged on his First Amendment right of freedom of speech.[11] Assume that you are a Supreme Court justice confronted with this claim: How do you go about deciding? Should Johnson's conviction be upheld? Or should the Texas law be struck down as unconstitutional?

One possible approach is deductive reasoning. According to the deductive model of judicial decision making, depicted in Figure 8.1, you, acting as a justice, would first analyze the facts of the case to determine the legal category into which the case might best fit. In *Texas v. Johnson*, for example, the category would be First Amendment cases and, more particularly, cases involving "symbolic speech" (expressive conduct). Next, you would identify the legal rule or standard that governed that category of cases. In constitutional cases, such as our example, you might find that legal rule in the Constitution itself or, more likely, in earlier rulings interpreting the applicable provision. By applying the rule to the facts of the case, you would then determine whether, according to the rule, the Texas law is constitutional, or whether Johnson's expressive conduct was

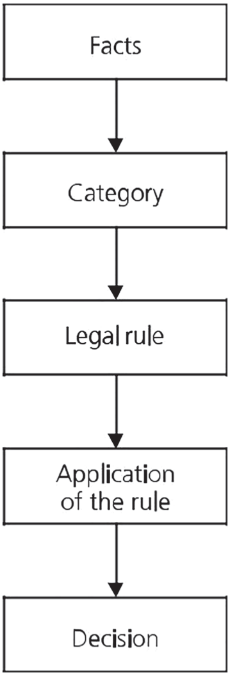


FIGURE 8.1 The Deductive Model of Judicial Decision Making.

protected by the Constitution. Finally, on the basis of this analysis, you would arrive at your decision.

Does the deductive model accurately depict how judges decide cases? The answer is both yes and no. The more settled the legal rule, the more likely it is that judicial decision making will resemble the deductive model. In many cases, judges can resolve the dispute straightforwardly on the basis of settled law. Indeed, Justice Benjamin Cardozo estimated that 90 percent of all cases are "pre-destined" in that they could be decided in only one way.[12]

Yet if judicial decision making were always so simple, a computer with all the pertinent legal rules stored in its memory could fill the position of a judge. More to the point, judges who knew the law would always agree on how cases should be decided. In fact, they often disagree.

Why is the deductive model not a fully adequate description of judicial decision making? For legal reasoning to follow the deductive model, there must be a single legal rule for the judge to apply in deciding the case. But there may be cases for which there is no controlling precedent or established legal rule—for instance, when a judge interprets a recently enacted statute, addresses a novel constitutional claim, or confronts an unprecedented situation at common law. For other cases, there may be more than one category or rule that seems applicable. In fact, the issue in dispute may be which rule to apply. Thus, the deductive model of judicial decision making cannot explain how judges deal with novel issues or choose between competing rules. Finally, the deductive model portrays the law as static, with judges consistently applying existing legal standards. In actuality, however, judicial decisions may change the law by overruling precedents or announcing new legal standards. The deductive model may explain legal stability, but it cannot account for a change in the law. It cannot explain why judges depart from precedent, or when they should do so.

Legal Reasoning as Reasoning by Example

The deficiencies of the deductive model led a group of legal scholars, known as the Legal Realists, to propose alternative explanations of judicial decision making. One influential Legal Realist, Edward Levi, suggested that legal reasoning is best understood as reasoning by example and analogy rather than as deductive reasoning.[13] Figure 8.2 illustrates Levi's theory.

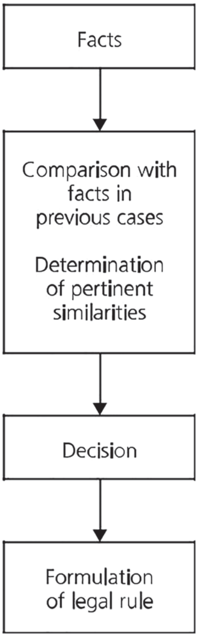

Facts
Comparison with facts in previous cases
Determination of pertinent similarities
Decision
Formulation of legal rule

FIGURE 8.2 Reasoning by Example: The Legal Realist Perspective on Judicial Decision Making.

Levi's Theory To explain Levi's theory, let us return to our example of *Texas v. Johnson*, the flag-burning case. According to Levi, a justice deciding that case would examine how the Supreme Court had previously dealt with expressive conduct that violated state or federal statutes. Presumably, the judge would discover that the Court had ruled that in some instances the First Amendment protected the expressive conduct and in other instances that it did not.[14] The judge would then consider whether the facts in the flag-burning case more closely resembled those in the cases in which the Court had vindicated the expressive conduct or in which it had refused to do so. Presumably, if the *Johnson* case more closely resembled those instances in which the Court had ruled that the expressive conduct was constitutionally protected and struck down the statutes regulating it, the judge would rule in favor of Johnson. If it more closely resembled those instances in which the Court had denied constitutional protection to the expressive conduct and upheld the laws regulating it, then the judge would rule in favor of Texas.

As Levi recognized, however, the issue is not that simple. Both sets of earlier cases—those upholding and those striking down laws regulating expressive conduct—presumably resemble the flag-burning case in some respects and differ from it in others. A judge must therefore determine which similarities or differences are decisive. According to Levi, this judicial determination of similarity and difference is the key step in the legal process.

To make this determination, the judge not only decides the case but also devises the legal rule by which the decision is justified. Assuming that the judge ruled in favor of the flag burner, the opinion would announce a legal rule that reconciled the ruling with previous decisions protecting expressive conduct. It would also explain why the present case differed from those in which the Court had ruled against First Amendment claims. Put differently, whereas the deductive model suggests that judges decide by applying known rules to diverse facts, Levi insists that "the rules arise out of a process which, while comparing fact situations, creates the rules and then applies them."[15]

Applying Levi's Theory: The Right to Privacy Levi's theory offers a dynamic model of the process of judicial decision making. The Supreme Court's rulings on the right to privacy can serve as an illustration.

The Court first recognized a constitutional right to privacy in *Griswold v. Connecticut* (1965).[16] At issue in *Griswold* was a Connecticut law that forbade the use of contraceptives and made it a criminal offense for anyone to provide birth control information. Although the Constitution does not expressly deal with contraception, Justice William O. Douglas, speaking for the Court, ruled that the Connecticut law violated the constitutional right to privacy, which he found implicit in various guarantees of the Bill of Rights. The statute, Douglas emphasized, invaded the "intimate relation of husband and wife," and its enforcement would require police to search the bedrooms of married couples for evidence of contraceptive use.[17] Thus, in recognizing a constitutional right to privacy, Douglas portrayed it as inhering in a particular relationship (marriage).

Seven years later, in *Eisenstadt v. Baird* (1972), the contraception issue again came before the Court.[18] Arrested for violating a Massachusetts law that forbade the distribution of contraceptives to unmarried people, William Baird claimed that the law violated the constitutional right to privacy recognized in *Griswold*. Clearly, there were similarities between the two cases. Both involved laws that forbade the distribution and use of contraceptives to prevent procreation. But there were also differences. The Massachusetts law did not interfere with marital relations, because it restricted distribution only to unmarried people, and its enforcement did not require police to invade the bedroom. The justices thus had to decide whether the situations in the cases were fundamentally similar, in which case they would invalidate the Massachusetts law on the basis of their precedent in *Griswold*, or different, in which case they could uphold it.

The Supreme Court in *Eisenstadt* struck down the Massachusetts law as a violation of the constitutional right to privacy. Speaking for the Court, Justice William Brennan noted, "If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental instruction into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[19]

Although the Court in *Eisenstadt* based its decision on the right to privacy, the quotation indicates that the Court's definition of the right—what Levi refers to as the rule or legal standard—had changed. No longer did the Court view the right to privacy as rooted in certain legally sanctioned relationships, such as marriage (the position it had taken in *Griswold*). Instead, it argued that the right to privacy belonged to the individual. The Court also expanded the right from a safeguard against unreasonable invasions of the marital bedroom into a right to choose whether to procreate.

One year later, the Supreme Court in *Roe v. Wade* confronted a constitutional challenge to state laws restricting abortion.[20] Those who attacked the laws argued that the restrictions on abortion resembled the restrictions on contraception invalidated in *Griswold* and *Eisenstadt*, because they intruded on a woman's decision whether to bear a child and therefore violated her constitutional right to privacy. Those who defended the laws insisted that even if the right to privacy includes the choice whether to procreate, that choice had been made when the woman became pregnant. They further argued that the state's valid interest in the life of the fetus, and in the safety of medical procedures for abortion, distinguished this situation from those on which the Court had already ruled. They thus concluded that the Court's rulings in *Griswold* and *Eisenstadt* did not require invalidation of the Texas law.

The Supreme Court in *Roe* disagreed. The right to privacy, seven justices held, extended to "activities relating to marriage, procreation, contraception, family relationships, and child rearing and education." This view represented an elaboration—or extension—of the Court's position in *Eisenstadt*. Having established a realm of freedom from unwarranted governmental regulation, the Court held that "a woman's decision whether or not to terminate her pregnancy" fit within this realm and thus was protected by the right to privacy.[21]

Thirteen years later, the Supreme Court in *Bowers v. Hardwick* (1986) addressed the question of whether the right to privacy extended to consensual homosexual activity, concluding that it did not.[22] In challenging the Georgia statute that prohibited sodomy, Michael Hardwick noted that the Court's previous privacy rulings—*Griswold*, *Eisenstadt*, and *Roe*—had all struck down governmental regulations affecting sexual relations. He argued that the Georgia statute resembled the laws struck down in earlier cases in that it too regulated choices associated with the realm of sexual intimacy and thus unconstitutionally invaded the right to privacy. The Court, however, rejected Hardwick's portrayal of the Court's earlier cases, insisting that they all involved a connection to "family, marriage, or procreation." Because the situation in *Bowers* differed in this crucial respect from those in earlier cases, the Court concluded that those cases did not require the extension of the right to privacy to protect homosexual activity.

As noted in the chapter's introduction, this interpretation did not last. Seventeen years after *Bowers*, the justices reversed course in *Lawrence v. Texas* (2003).[23] In striking down a Texas law that outlawed same-sex anal intercourse, the Court majority concluded that the Court had misinterpreted the situation in *Bowers*. The laws in *Lawrence* and in *Bowers* "touch[ed] upon the most private human conduct, sexual behavior, and in the most private of places, the home." The Court maintained that the right to privacy protected a realm of personal autonomy in such matters and thus viewed the conduct in *Lawrence* as basically similar to the conduct protected in other right-to-privacy cases.

However, in *Dobbs v. Jackson Women's Health Organization* (2022) the Supreme Court overruled *Roe v. Wade* and held that the Constitution did not safeguard a woman's right to terminate her pregnancy. This ruling also cast doubt on *Lawrence* and earlier right-to-privacy cases. Indeed, in a concurring opinion Justice Clarence Thomas stated that "in future cases we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."[24] However, no other justice joined Thomas's opinion.

Implications

This survey of the Supreme Court's privacy rulings illustrates how legal change may occur in a system of precedent. Judges may not apply precedent in the mechanical fashion the deductive model suggests. Rather, they may reason by example or analogy and thus expand or narrow the reach of earlier decisions. In *Eisenstadt* and *Roe*, for example, the Court discovered similarities to *Griswold* that led it to extend the right to privacy to new situations. In contrast, the Court found that the situation in *Bowers* was fundamentally different from that in previous cases and concluded that the right to privacy did not prevent legal regulation of homosexual activity. Only when the Court in *Lawrence* reconceptualized its understanding of the facts did it reach a different conclusion. Finally, in *Dobbs* the Supreme Court, by that time dominated by a different set of justices, concluded that *Roe* was wrongly decided and that the precedent should thus be overruled, though the justices in the *Dobbs* majority were divided over whether the Court's other right-to-privacy rulings were likewise constitutionally suspect.

If judicial decision making does not proceed by deductive reasoning, can judges not manipulate precedents and other legal materials in order to decide cases on the basis of their personal values? There is no simple answer to this question. One check on judges is that they must explain and justify their rulings in written opinions. These opinions are subject to public scrutiny and criticism, which imposes some limitation on judges. In addition, judges operate within constraints imposed by the craft of judging and the traditions of the law. Among these constraints is the notion that judges should decide according to law, even though it may conflict with their personal views. Box 8.3 suggests that judges take this responsibility seriously. However, it also suggests that how judges interpret the law may be affected by their backgrounds, experience, and personal values. This recognition leads us to the political perspective on judicial decision making.

THE POLITICAL PERSPECTIVE

The political perspective on judicial decision making begins with the phenomenon of dissenting opinions on multimember courts. In the majority of cases decided by the U.S. Supreme Court in recent years, one or more justices dissented. Although dissent rates are lower on federal courts of appeals and state appellate courts, judges on those courts also disagree

Box 8.3 Judicial Perspectives on Personal Values and Decision Making

"One who belongs to the most vilified and persecuted minority in history is not likely to be insensitive to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant, I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic … As a member of this Court, I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard."

Justice Felix Frankfurter, dissenting in *West Virginia Board of Education v. Barnette* (1943)

"The language of the judicial decision is mainly the language of logic … Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding."

Justice Oliver Wendell Holmes, at that time a member of the Massachusetts Supreme Judicial Court (1897)

"Since 1879 Connecticut has had on its books a law which forbids the use of contraceptives by anyone. I think this is an uncommonly silly law … But we are not asked in this case to say whether we think the law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And this I cannot do."

Justice Potter Stewart, dissenting in *Griswold v. Connecticut* (1965)

"Here, indeed, is the point of contact between the legislator's work and [the judge's]. The choice of methods, the appraisement of values, must in the end be guided by like considerations for the one as for the other … [Y]et the judge, even when he is free, is still not wholly free … He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in social life.""

Justice Benjamin Cardozo, then of the New York Court of Appeals (1921)

"Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty … Were I a legislator, I would vote against the death penalty … I do not sit on these cases, however, as a legislator … Although personally I may rejoice at the Court's result, I find it difficult to accept or justify as a matter of history, of law, or of constitutional pronouncement."

Justice Harry Blackmun, dissenting in *Furman v. Georgia* (1972)

SOURCES: The quotations from extrajudicial writings are from Oliver Wendell Holmes, "The Path of the Law," *Harvard Law Review* 10 (1897): 444; and from Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, CT: Yale University Press, 1921), p. 141.

on how cases should be resolved. According to the political perspective, these disagreements cannot be attributed to legal factors. When a multimember court decides a case, all the judges are construing the same enactments, interpreting the same precedents, and applying the same law to the same set of facts. Thus, differences in the law or in the facts cannot explain differences in judgment.

According to the political perspective, differences in judgment occur because the law does not really determine the outcome of most cases. Rarely is the law so clear and definite that only a single position is legally defensible. Rather, the plaintiff and the defendant can each make a substantial legal argument for ruling in their favor. This is particularly likely when, as is true for the U.S. Supreme Court and many state supreme courts, the justices have discretion to exclude legally unambiguous cases from their docket. In such circumstances, judges must choose among possible outcomes, and their choices reflect the judges' personal political views. The judges' views, then, and not the law, ultimately determine how cases are resolved.

Judicial decision making, however, involves more than judges reading their policy preferences into the law. As James Gibson has observed, "Judges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do."[25] The attitudes of judges determine what they want to do; their role conceptions—that is, their conceptions of proper judicial behavior—affect what judges believe they ought to do; and public opinion and the institutional context in which they operate circumscribe what judges find it feasible to do. As Figure 8.3 suggests, these factors are often interrelated.

Attitudes

As noted in Chapter 3, judicial selection is a political process. Presidents typically nominate members of their own political party for federal judgeships, and they inquire into potential nominees' legal and political views, especially before filling vacancies on the Supreme Court. Politics also affects judicial selection in the states. Partisan election systems, of course, reward loyal and active party members. Political considerations also affect gubernatorial appointments, even when governors are choosing judges under the process of "merit selection." Given the extensive political backgrounds of those who become judges, they tend to bring to the bench consistent and long-established political views.

The Development of Attitudes What factors shape the attitudes, the values and beliefs, of judges? Assuming, as the political perspective does, that judicial decision making closely resembles political decision making,

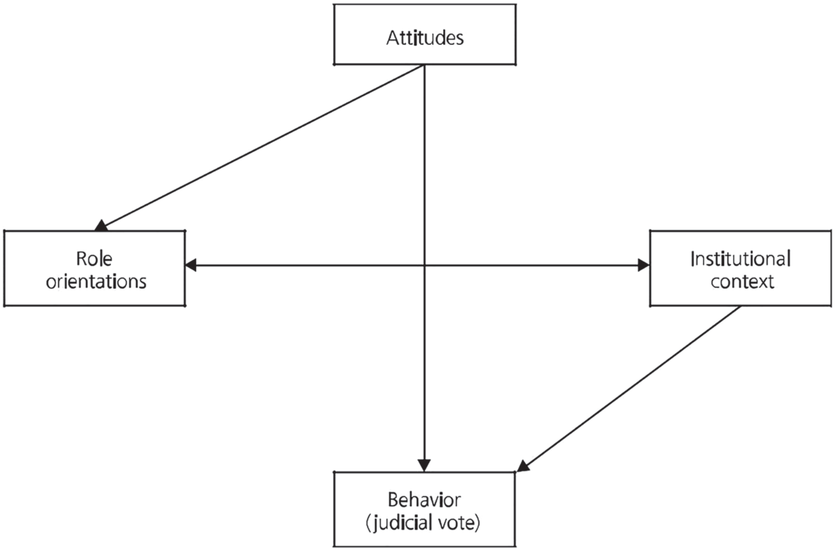


FIGURE 8.3 The Political Perspective on Judicial Decision Making.

SOURCE: Based on the analysis in James L. Gibson, "From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior," *Political Behavior* 5 (1983): 7–49.

as well as decision making more generally, it follows that the same factors that influence political behavior generally should also influence, either directly or indirectly, how judges decide cases. The formation of politically relevant attitudes begins in early childhood, as family background, religion, and socioeconomic status influence the development of individuals' political beliefs and behavior.[26]

Judges' values and beliefs, like those of other citizens, may also be influenced by significant political events and nationwide changes in the pattern of opinion. For one generation, the crucial event was the Great Depression or World War II; for another, the Vietnam War; and for more recent generations, perhaps the terrorist attack on the World Trade Center, the rise of Donald Trump, or the COVID pandemic. Recall Justice Benjamin Cardozo's comment: "The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."[27]

Established social practices and patterns of opinion within a particular region may also influence judicial attitudes. The values and beliefs of those growing up in the South before the Civil War, for example, were inevitably affected by the institution of slavery, although reactions to that system varied among individuals. More recently, scholars have documented differences in political culture among the various states, differences in patterns of thought and behavior that presumably affect all within those states.[28] Given the political character of judicial selection, one would expect only those who supported the reigning values in the state to attain positions as judges.

According to "Mr. Dooley," a political commentator of the early twentieth century, "The judges follow the election returns."[29] Dooley's remark exaggerates the influence of immediate political factors on judicial decisions, but it points to an important truth: The legal safeguards of judicial independence do not altogether shield judges from the political environment. Like everyone else, judges follow the news and are aware of societal developments and trends in public opinion, including reactions to their decisions. While one would not expect judges to tailor their rulings to conform to public opinion, the political environment may nonetheless influence judicial decision making, particularly because that environment influences who gets chosen to serve as judges.

The Effects of Attitudes on Decisions Do judges' personal attitudes influence the outcome of cases? Despite judges' efforts to banish personal views from their decisions (see Box 8.3), many studies suggest that judges' attitudes do affect their votes. What is particularly significant is that the judges' votes often follow clear patterns, dividing along what might be considered liberal and conservative lines. The U.S. Supreme Court furnishes a prime example.

When Supreme Court justices disagree in civil liberties cases, some justices (e.g., Ketanji Brown Jackson and Sonia Sotomayor) consistently take what is seen as the liberal position, whereas other justices (e.g., Clarence Thomas and Samuel Alito) regularly adopt the conservative position. These findings might seem to suggest that the law is nothing but an elaborate charade, designed to fool a credulous public while freeing judges to pursue their own policy goals. But the connection between judges' attitudes and their votes is in fact subtler than that. When the appropriate legal outcome in a case is clear, decisions are unanimous, regardless of the judges' attitudes. Thus in its 2020 Term, the U.S. Supreme Court decided more than 40 percent of its cases without a dissent. But when the appropriate legal outcome is not clear, when appellate judges are confronted with persuasive legal arguments on both sides of an issue, they must determine which arguments are stronger. According to the political perspective, the judges' attitudes inevitably affect this determination by influencing the judges' perception of the issues in the case and their judgment about the strength of the competing legal arguments. The judges are not engaged in duplicity; they simply cannot altogether escape who they are.

If political attitudes affect the votes of judges on the U.S. Supreme Court, presumably they should on other courts as well. This is difficult to confirm directly, however, because state and federal judges do not grant interviews to discuss their political views. Researchers have therefore approached the issue indirectly, often by looking for connections between judges' party affiliations and their voting behavior. This research assumes that because Republicans and Democrats have different political perspectives, party membership will be a good indicator of judges' attitudes: Republican judges will be more conservative and Democratic judges more liberal. Therefore, if judges' attitudes decisively influence their votes, one should be able to predict the overall pattern of their votes by knowing the judge's party affiliation.

Do party affiliations help predict how judges vote? The most comprehensive survey of research on the issue concludes that there are strong connections between judges' political affiliations and their voting behavior.[30] On the Supreme Court, the conservative bloc (Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett) is made up of justices appointed by Republican presidents, while the liberal bloc (Justices Sotomayor, Kagan, and Jackson) is made up of justices appointed by Democratic presidents. This connection holds true regardless of whether the courts are federal or state, trial or appellate. Nonetheless, one must be cautious about attributing judicial decisions solely to judges' political attitudes. The connection between affiliation and voting behavior is not universal: the divisions on some courts bear no relation to the judges' partisan affiliations. In addition, the strength of the connection between party and judicial voting varies from issue to issue and over time, sometimes on the same court.

Other studies have examined connections between judges' social backgrounds or other attributes (e.g., their state of birth, gender, and race) and their voting behavior on the bench. Underlying these studies is the assumption that the judges' backgrounds and attributes shape their attitudes, which in turn affect their decisions.[31] For example, some studies have found that judges who have had previous experience as prosecutors are more likely to be judicial conservatives.[32] The connection between background characteristics and a judge's voting behavior, however, varies from study to study.[33] Perhaps surprisingly, attributes that one might expect to be important, such as race or gender, have little independent effect on a judge's behavior on the bench.[34]

If one cannot consistently predict judges' voting behavior from their social backgrounds, the reason may lie in the influence of other factors on judicial decision making. Among the most important of these are judicial role orientations.

Judicial Role Orientations

As the quotations in Box 8.3 show, judges recognize that they should submerge their personal beliefs, however deeply felt, and decide cases in accordance with the law. They also subscribe to other beliefs about what is appropriate and inappropriate judicial behavior. To some extent, the judge's beliefs mirror societal views about the responsibilities of a judge. But the judge's views are elaborated and refined during professional training in law school, through work as a practicing attorney, and through involvement with other members of the legal profession. Once judges are on the bench, their beliefs are further influenced by their experiences as judges and by the expectations of those with whom they interact, especially their fellow judges.[35]

The process of socialization to the norms of a profession is, of course, not unique to judges. Teachers, doctors, insurance agents, and others all undergo a similar process of learning the norms of conduct for their professions. Beliefs about the sorts of behavior appropriate for judges are referred to as *judicial role orientations*.

Judicial role orientations operate as self-imposed obligations, restricting the actions that a judge undertakes. They are important because they can affect judicial decisions. For example, role orientations may prevent judges from voting in line with their personal beliefs. As Box 8.3 shows, in *Furman v. Georgia* Justice Harry Blackmun voted to uphold the constitutionality of the death penalty even though he abhorred capital punishment on moral grounds. Similarly, Felix Frankfurter voted to uphold state laws requiring students to salute the American flag despite his opposition to such laws. In both instances, the justices voted as they did because of their conceptions of appropriate judicial behavior—in particular, their belief that judges' personal convictions should not affect their votes.

As these examples suggest, judicial role orientations usually do not require that a judge vote for a particular outcome. Rather, they affect how judges go about making their decisions. More specifically, role orientations indicate the factors that judges believe they can legitimately consider and how much weight they should give those factors in making their decisions. The influence of judicial role orientations can be seen in how judges treat precedent. If judicial attitudes alone determined judicial decisions, then judges would uphold precedents that supported outcomes they favored and overrule precedents that produced disagreeable results. In actuality, however, some judges believe that they should adhere to the court's previous rulings, even if they might decide the case differently in the absence of precedent.[36] Thus, when Sandra Day O'Connor was appointed to the Supreme Court by President Ronald Reagan, it was assumed that she shared the president's conservative philosophy and would vote accordingly. However, when the justices had the opportunity to overrule *Roe v. Wade*, the Court's controversial abortion decision, in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), O'Connor refused to do so, citing the force of precedent.[37] Similarly, despite the Bush administration's urgings in an *amicus curiae* brief, Justice

David Souter disappointed the president who appointed him by voting to strike down religious invocations at graduation ceremonies as a violation of the establishment clause.[38] He too justified his position as having been compelled by long-established Court precedents.

Although role orientations affect judicial decisions, their exact impact is difficult to determine. There is no consensus about what constitutes proper judicial behavior. Rather, the norms of appropriate conduct vary somewhat from court to court and within courts over time. The practice of filing dissenting opinions provides one example. The norms of judicial behavior on some courts discourage public expressions of dissent, whereas on other courts judges are free to dissent whenever they disagree with the court majority. And whereas divisions among the justices were once frowned upon on the U.S. Supreme Court, today concurring and dissenting opinions are filed in many cases, and justices often file opinions agreeing with part but not all of the Opinion of the Court.

In addition, despite broad areas of agreement (e.g., judges should not engage in partisan politics while on the bench), sitting judges may have quite different conceptions of the judicial role.[39] Some judges subscribe to a philosophy of judicial restraint, which limits the factors that they can validly consider in reaching a decision and the circumstances in which they can legitimately overrule a precedent or strike down a legislative enactment. Other judges embrace a philosophy of judicial activism, which places less emphasis on the doctrine of *stare decisis* and on deference to legislative judgment. Appropriate judicial behavior, then, depends on the judge's choice of a particular role orientation. Conceivably, a judge's choice among possible role orientations may be influenced by the judge's attitudes and political values. Thus, during the 1960s and 1970s, liberal judges also tended to be activists. Since the mid-1980s, however, judicial conservatives have been interested in reversing many of the rulings of their liberal predecessors and, thus, one finds some conservative judges, such as Justices Clarence Thomas and Samuel Alito, exhibiting an activist role orientation.

Institutional Factors

Because the decisions of appellate courts are group decisions, interactions among judges also influence judicial decision making. By itself, the vote of a single judge cannot determine the outcome of a case. Thus, judges who wish to ensure that a case is decided in line with their views must convince other judges to endorse their position. Yet the norms governing judicial behavior limit the means judges may use to gain acceptance of their position. Whatever efficacy force or intimidation may have in international conflicts, judges cannot use such tactics to achieve their goals. They cannot, like a legislator, trade a vote in one case to gain votes for their position in another. Nor can they promise political support for those who vote with them or threaten political ruin for those who oppose them.

Perhaps the most potent weapon available to a judge is legal expertise—and the ability to bring that expertise to bear in a well-crafted judicial opinion. As a federal court of appeals judge put it, "Some judges are simply better than others. Some know more, think better. It would be strange if among nine men all had the same ability. Some simply have more respect than others."[40] The importance of legal expertise is hardly surprising. Committed to deciding cases in accordance with the law, judges are receptive to legal arguments from their colleagues. If those arguments are compelling, they can be persuaded to switch their votes. As Justice Robert Jackson once admitted: "I myself have changed my opinion after reading the opinions of the other members of this Court. And I am as stubborn as most."[41] Of course, the arguments that judges find compelling may to some extent depend on their attitudes and their role conceptions, and justices seeking to entice colleagues to join their opinions are likely to frame their arguments accordingly. Also, judges are more likely to be persuaded by colleagues who generally share their perspective on legal issues.

If judges may persuade their colleagues to vote with them by the strength of their arguments, they may also threaten to write an opinion attacking the position taken by those who reject their arguments. The effectiveness of this threat generally depends on the judge's ability to present a persuasive legal argument. As Box 8.3 reveals, judges do not shrink from making stinging attacks on the reasoning of their colleagues or the coherence of their views. Sometimes these attacks can undermine the collegiality on a court.

An appellate court is in reality a small group working together over a prolonged period of time: for the judges, it is "a little like being married in a system of arranged marriage with no divorce."[42] Thus, it is not surprising that personal relations with fellow judges also play a role in judicial decision making; agreeable and considerate judges are apt to gain a better reception for their arguments than their more contentious colleagues. Ultimately, though, judges typically come to the bench with firmly established views, and their fellow judges have few weapons beyond legal argument to induce them to change their minds. Group interaction therefore has only a limited effect on how judges vote.

A THIRD PERSPECTIVE

Political scientist Lawrence Baum has proposed a third perspective that combines aspects of the legal and political perspectives.[43] Both those perspectives, he notes, portray judges as motivated solely by their interest in the substance of legal policy. Thus, according to the legal perspective, judges seek to determine what case outcomes best accord with the law. And according to the political perspective, judges seek to determine what outcomes best advance their policy objectives. But as Baum sees it, both accounts rest on too narrow a view of human motivation and fail to recognize the range of factors that affect human behavior. More specifically, Baum notes that human beings act not only to achieve particular ends but also to win the approval of those whose esteem they value. This personal interest in popularity and respect is common to everyone. Transferring this insight to the realm of courts, Baum focuses on how judges seek to win the approval of the audiences they value through their decisions, their communication of those decisions, and their interactions on the bench.

Whose approval might judges seek? For judges on a multimember court, one obvious audience is one's fellow judges. Judges do not seek the approval of their colleagues merely to advance their policy goals; judges value the respect of their colleagues for its own sake, and because it influences their own perceptions of their performance as judges.

Beyond the confines of the court, important audiences for judges might include the general public, other branches of government, the legal profession, and the judge's social peers. The importance of particular audiences may vary, depending on the character of the judge and on the position that she occupies. For example, judges on a trial court or lower appellate court might be interested in impressing those who have the power to elevate them to a position on a higher court. Judges who must seek reelection or reappointment necessarily desire the approval of those who have the power to retain them in office.

According to Baum, judges are particularly likely to value the approval of their professional peers and of the social groups with which they associate, because their respect is so essential to the judges' sense of themselves. Judges therefore have a strong incentive to decide cases in such a way as will attract their approval and avoid alienating them. Does this actually happen? Recall the discussion of *Lawrence v. Texas* that opened this chapter. In his dissenting opinion, Justice Scalia charged that the Court's ruling was influenced by a desire to please the justices' peers in the legal profession, that the ruling was "the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda." Because the ruling was "directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct," one adopting Baum's approach might also inquire whether Scalia's dissent reflected a desire for the approval of those who hold a more traditional view of homosexual conduct. More generally,

Box 8.4 Judicial Attacks

Because appellate courts are small groups in which judges must work together over a long period, one might expect that judges would refrain from harshly criticizing the rulings and opinions of their colleagues. As these excerpts from Supreme Court opinions reveal, however, that is not the case: justices are quite willing to attack the views of those who disagree with them in a case.

> "Nothing in the letter or the spirit of the Constitution or in the precedents squares with the heavy-handed and one-sided action that is so precipitously taken by the court in the name of fulfilling its constitutional responsibilities."
>
> Justice John Marshall Harlan, dissenting in
> *Miranda v. Arizona* (1966)

> "Not in my memory has a plurality gone about its business in such a deceptive fashion. At every level of its review, from its effort to read the real meaning out of the Missouri statute, to its intended evisceration of precedents and its deafening silence about the constitutional protection it would jettison, the plurality obscures the portent of its analysis."
>
> Justice Harry Blackmun, dissenting in
> *Webster v. Reproductive Health Services* (1989)

> "Once we depart from the text of the Constitution, just where … do we stop? The most amazing feature of the Court's opinion is that it does not even purport to give an answer … Evidently, the governing standard is to be what might be called the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis."
>
> Justice Antonin Scalia, dissenting in *Morrison v. Olson* (1988)

> "A number of Justices just short of a majority of the majority that promulgates today's passionate dialectics joined in answering them in [a decision just four years prior]. The distinction attempted between that case and this is trivial, almost to the point of cynicism … Today's judgment will be more interesting to students of psychology and of the judicial processes than to students of constitutional law."
>
> Justice Robert Jackson, dissenting in *Zorach v. Clauson* (1952)

> "A few citations to "research in psychology" that have no particular bearing upon the precise issue here cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing. The Court's argument … is, not to put too fine a point on it, incoherent."
>
> Justice Antonin Scalia, dissenting in *Lee v. Weisman* (1992)

> "One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was."
>
> Justice Harry Blackmun, dissenting in
> *Wards Cove Packing Co. v. Atonio* (1989)

as political divisions in America have grown sharper, a similar polarization has occurred in the legal profession as well. Conservative judges have found a congenial home in The Federalist Society—indeed, six Supreme Court justices are or have been members—while liberal judges have gravitated more to the American Bar Association or perhaps the American Constitution Society.[44]

ANALYZING THE PERSPECTIVES

This chapter has described three perspectives on judicial decision making. The legal perspective views judicial decision making as a process of reasoning based on legal principles and judicial precedents. These principles and precedents prescribe a particular outcome in many cases. Even when there is a realm of choice for the judge, law circumscribes the range of choice and guides its exercise. Thus, the law is the most important determinant of judicial decisions.

The political perspective views judicial decision making as a process in which extralegal factors, such as the judges' attitudes and role orientations, are the primary influences on judicial decisions. According to this view, judges' attitudes and orientations color how they view the law and the facts in a case and thereby determine the decisions they reach.

The third perspective likewise views extralegal factors as decisive. However, this perspective highlights the importance of judges' desire to seek approval and respect from audiences within and outside the courts on which they serve. The desire to win the approval of other judges, close social contacts, legal scholars, opinion makers, and others influences both the decisions judges render and their behavior on and off the bench.

Which of these accounts of judicial decision making is more accurate? Unfortunately, the question has no clear-cut answer. Judges may differ in the extent to which their political and other attitudes affect their interpretation of the law and their decisions. In addition, the influence of such attitudes may vary from case to case, depending upon the facts and issues involved. Thus the best account of judicial decision making may incorporate both legal and extralegal factors. It seems reasonable to assume that judges take their oath to dispense equal justice under law seriously. Thus, when the law is clear, judges can be expected to follow it. As the Legal Realists have shown, however, often the law is not clear, and the judge must choose between two plausible legal arguments. Though judges recognize that they must choose the stronger legal argument, their perception of the facts of the case and the strength of the competing arguments is influenced by their experience and beliefs. Their choices, then, cannot be divorced from their attitudes.

Nevertheless, judges are members of the legal profession, and their beliefs have been formed by their legal training. They therefore recognize an obligation not to read their own beliefs into the law. Indeed, their understanding of their responsibilities as judges—their role orientation—encourages them to guard against it. Even though judges' efforts to banish personal views from their decisions are unlikely to be fully effective, they do have some effect. Thus, in the words of Justice Felix Frankfurter:

> The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge personal feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline, and that fortunate alchemy by which men are loyal to the obligations with which they are entrusted.[45]

NOTES

1 *Bowers v. Hardwick*, 492 U.S. 361 (1989); *Lawrence v. Texas*, 539 U.S. 558 (2003). The Supreme Court subsequently recognized a right to same-sex marriage in *Obergefell v. Hodges*, 576 U.S. 644 (2015).

2 Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, CT: Yale University Press, 1921), p. 168.

3 Richard A. Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification* (Stanford, CA: Stanford University Press, 1961), pp. 26–27.

4 Joseph C. Hutcheson, Jr., "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision," *Cornell Law Quarterly* 14 (1929): 274.

5 Felix Frankfurter, "Some Reflections on the Reading of Statutes," *Columbia Law Review* 47 (1947): 527.

6 *Lake County v. Rollins*, 130 U.S. 662, 670 (1889).

7 *Towne v. Eisner*, 245 U.S. 418, 425 (1925).

8 The usefulness and limitations of these materials are surveyed in James H. Hutson, "The Creation of the Constitution: The Integrity of the Documentary Record," *Texas Law Review* 65 (November 1986): 1–40.

9 Reed Dickerson, *The Interpretation and Application of Statutes* (Boston, MA: Little, Brown, 1975), chap. 10.

10 Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, NJ: Princeton University Press, 1997); Paul Brest, "The Misconceived Quest for the Original Understanding," *Boston University Law Review* 60 (March 1980): 204–238.

11 *Texas v. Johnson*, 491 U.S. 397 (1989).

12 Cardozo, *The Nature of the Judicial Process*, p. 149.

13 Edward H. Levi, *An Introduction to Legal Reasoning* (Chicago, IL: University of Chicago Press, 1949).

14 Compare, for example, *Cohen v. California*, 403 U.S. 15 (1971), with *United States v. O'Brien*, 391 U.S. 367 (1968).

15 Levi, *An Introduction to Legal Reasoning*, p. 4.

16 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

17 Ibid., p. 486.

18 *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

19 Ibid., p. 453.

20 *Roe v. Wade*, 410 U.S. 113 (1973).

21 Ibid., p. 153.

22 *Bowers v. Hardwick*, 478 U.S. 186 (1986).

23 *Lawrence v. Texas*, 539 U.S. 558 (2003).

24 *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ (2022),

25 James L. Gibson, "From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior," *Political Behavior* 5 (1983): 9.

26 See Lawrence Baum, *Ideology in the Supreme Court* (Princeton, NJ: Princeton University Press, 2017).

27 Cardozo, *The Nature of the Judicial Process*, p. 168.

28 Daniel J. Elazar, *American Federalism: A View from the States*, 3rd ed. (New York: Harper & Row, 1984).

29 Finley Peter Dunne, *The World of Mr. Dooley*, Louis Filler ed. (New York: Collier Books, 1962), p. 89.

30 Daniel R. Pinello, "Linking Party to Judicial Ideology in American Courts: A Meta-Analysis," *Justice System Journal* 20 (1999): 219–254.

31 Gibson, "From Simplicity to Complexity," pp. 23–26.

32 See Neal C. Tate, "Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economic Decisions, 1946–1978," *American Political Science Review* 69 (June 1975): 355–367.

33 See Joel B. Grossman, "Social Backgrounds and Judicial Decision-Making: Notes for a Theory," *Journal of Politics* 29 (May 1967): 334–351.

34 Gibson, "From Simplicity to Complexity," pp. 21–22.

35 James L. Gibson, "Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model," *American Political Science Review* 73 (September 1978): 918.

36 Some scholars question to what extent precedents constrain judicial decisions. See Harold J. Spaeth and Jeffrey A. Segal, *Majority Rule or Minority Will: Adherence to Precedence on the U.S. Supreme Court* (New York: Cambridge University Press, 1999).

37 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 502 U.S. 1056 (1992).

38 *Lee v. Weisman*, 505 U.S. 577 (1992).

39 See Henry R. Glick, *Supreme Courts in State Politics: An Investigation of the Judicial Role* (New York: Basic Books, 1971), chap. 2, and Gibson, "Judges' Role Orientations, Attitudes, and Decisions."

40 J. Woodford Howard, *Courts of Appeal in the Federal Judicial System* (Princeton, NJ: Princeton University Press, 1981), p. 230. See more generally Walter F. Murphy, *Elements of Judicial Strategy* (Chicago, IL: University of Chicago Press, 1964), chap. 3.

41 Quoted in Alan Westin, *The Anatomy of a Constitutional Law Case* (New York: Macmillan, 1958), pp. 123–124.

42 Richard A. Posner, *The Federal Courts: Challenge and Reform* (Cambridge, MA: Harvard University Press, 1996), p. 355.

43 Lawrence M. Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton, NJ: Princeton University Press, 2006).

44 Neal Devins and Lawrence Baum, *The Company They Keep: How Partisan Divisions Came to the Supreme Court* (New York: Oxford University Press, 2019).

45 *Public Utilities Commission v. Pollak*, 343 U.S. 451, 466 (1959).

PART III

Judicial Policymaking

9 Judicial Policymaking: An Introduction 273

10 Federal Court Policymaking 298

11 State Court Policymaking 329

Taylor & Francis
Taylor & Francis Group
http://taylorandfrancis.com

9

Judicial Policymaking: An Introduction

Throughout American history, judges have been accused of deciding cases based on their own policy preferences rather than in accordance with the law. During the first third of the twentieth century, it was liberals who levelled the charge of judicial usurpation. The justices of the Supreme Court, they claimed, based their rulings on a particular economic theory (laissez-faire capitalism) rather than on the Constitution. From the 1950s through the 1980s, it was conservatives' turn to express outrage. They denounced the Supreme Court's rulings on pornography, abortion, school prayer, and the rights of defendants as elements of a liberal social agenda with little or no constitutional basis. In recent years liberals have again attacked judicial decisions, charging that they reflect nothing more than the justices' political ideology.

One need not accept all these charges as accurate. Critics often see a dereliction of judicial duty in every decision with which they disagree. Nevertheless, the critics sound a common theme: The judge's task is to "say what the law is," not to make law.[1] Policymaking is the responsibility of the other branches of government, so judges who engage in policymaking are usurping power and behaving improperly.

But from another perspective, judicial policymaking is neither exceptional nor suspect. Courts "say what the law is" in the course of deciding cases, and deciding cases inevitably enmeshes them in policy disputes. Their rulings may announce authoritative legal standards that define public policy within the jurisdiction they serve. In some cases, their rulings may influence political action and stimulate or retard societal change, regardless of whether judges decide the cases properly and whether their

DOI: 10.4324/9781003440055-12

rulings uphold or strike down governmental actions. The cases of *Grutter v. Bollinger* (2003) and *Gratz v. Bollinger* (2003) illustrate the point.[2]

In *Grutter*, the U.S. Supreme Court upheld an affirmative-action program for admission to the University of Michigan Law School; but in *Gratz*, it struck down a somewhat different affirmative-action program for undergraduate admissions at the same university. Taken together, the Court's decisions clarified what sorts of affirmative-action programs would survive constitutional scrutiny and what sorts would not. As a result, the University of Michigan retained its criteria for admission to its law school but revised its criteria for undergraduate admissions. The Court's rulings also provided guidance to other colleges and universities that used affirmative action in admissions. Had the Court ruled differently in either of those cases, either upholding or invalidating both programs, this also would have had policy consequences. Invalidation of both programs might have led some institutions to abandon their affirmative-action programs, or it might have encouraged them to seek alternative means of ensuring diversity in their student populations. Conversely, upholding both programs might have encouraged advocates of affirmative action to pressure schools without affirmative-action programs to institute them, because the Court had ruled that they were constitutionally permissible. In fact, the Court's ruling in *Grutter* prompted an immediate political response: in 2006, voters in Michigan approved an initiative outlawing racial preferences in the state's colleges and universities. And since then opponents of affirmative action have continued to challenge those programs in court.

*Grutte*r and *Gratz* show that judges cannot altogether avoid policymaking. But they do not prove that critics of judicial policymaking are mistaken. Rather, the two perspectives on judicial policymaking can be viewed as complementary. Whereas one view emphasizes that judicial rulings inevitably have policy consequences, the other view cautions that rulings rooted in the judges' policy views are inappropriate. Before examining how to distinguish appropriate from inappropriate judicial policymaking, let us look at how judges affect policy, as summarized in Table 9.1.

THE OCCASIONS OF JUDICIAL POLICYMAKING

Judicial Review and Constitutional Policymaking

Constitutions specify the scope of governmental powers, divide those powers among the various branches of government, and confer rights that government cannot violate. When a government exceeds the powers granted to it, when a branch of government exercises powers conferred on another branch, or when a government infringes on constitutionally

TABLE 9.1 Types of Judicial Policymaking

Type of Policymaking	Definition	Major Policymakers	Legal Basis	Eras of Greatest Policymaking
Constitutional	Judicial review of governmental action to determine its consistency with constitutional requirements	U.S. Supreme Court; state supreme courts	Federal Constitution, state constitution	For federal courts, since the late nineteenth century; for state courts, 1880–1930s and 1970s to the present
Remedial	Establishment and implementation of requirements to eliminate constitutional violations or meet constitutional requirements	Federal district courts	Use of equity power to achieve constitutionally mandated situation	Since the late 1950s (*Brown v. Board of Education*)
Statutory interpretation	Interpretation and application of legislative enactments	Federal courts of appeals; state appellate courts	Federal legislation, state legislation	Since the increase in legislation in the late nineteenth and early twentieth centuries
Oversight of administrative activity	Review of administrative activity to ensure that it is consistent with constitutional, statutory, or agency requirements	Federal courts of appeals; state appellate courts	Federal or state constitution; federal or state legislation; agency rules or other requirements	Since the growth of regulatory agencies, beginning in the early twentieth century, with major increases during the New Deal (1930s) and Great Society (1960s)
Common law	Judicial enunciation and application of legal standards in the absence of legislation or administrative law	State appellate courts	Judicial precedents, societal standards	During the first half of the nineteenth century and in tort law since World War II
Cumulative	Judicial development of policy through the exercise of discretion in resolving a large number of similar cases	State trial courts	Established practices within the court or jurisdiction	No particular period

protected rights, its actions are unconstitutional. Those who are injured by the government's unconstitutional actions may challenge them in the courts and call on judges to invalidate those actions. The power of the courts to determine whether the government's actions are consistent with the Constitution, and to invalidate those that are not, is known as *judicial review*.

Since the U.S. Supreme Court first used the power of judicial review to strike down a federal statute in *Marbury v. Madison* (1803), judicial review has furnished a prime basis for judicial involvement in policymaking. Courts exercise judicial review in ruling on the constitutionality of federal or state legislation. As Table 9.2 reveals, the U.S. Supreme Court has struck down more than 160 federal statutes and almost 1000 state laws. Other governmental actions are likewise subject to constitutional scrutiny. In the celebrated case of *United States v. Nixon* (1973), for example, the Supreme Court ruled that President Richard Nixon could not withhold tapes of White House conversations from a federal district court seeking them for use in a criminal prosecution.[3] More frequently, it is lower-level officials, such as police officers, whose actions are challenged as unconstitutional: the Supreme Court regularly decides cases addressing whether searches or interrogations conducted by police were constitutional.

The U.S. Supreme Court's constitutional rulings establish binding precedent for all courts in the United States, and the effects of its rulings are felt nationwide. Other federal and state courts also have the authority to consider whether governmental actions coincide with federal constitutional requirements. The rulings of these courts, although they affect only a limited geographic area, may also involve important

TABLE 9.2 Statutes Declared Unconstitutional by the U.S. Supreme Court

	Federal Statutes	State Statutes
1791–1860	2	2
1861–1880	11	53
1881–1900	9	67
1901–1920	18	114
1921–1940	26	173
1941–1960	7	71
1961–1980	37	286
1981–2000	41	137
2001–2020	33	52

policy matters. In *James v. Wallace* (1974), for example, a federal district court ruled that confinement in certain Alabama prisons—which were plagued by overcrowding, violence, and grossly inadequate health care—violated the constitutional ban on cruel and unusual punishments.[4] To remedy the constitutional violation, Judge Frank Johnson ordered extensive reforms in the prisons, requiring substantially increased state expenditures, and established his own guidelines for prison operations.[5] State courts' authority to consider constitutional violations under their state constitutions, as well as under the federal Constitution, may furnish an additional basis for judicial intervention. In 2003, the Massachusetts Supreme Judicial Court ruled that the state could not refuse marriage licenses to same-sex couples; and in 2022, the North Carolina Supreme Court held that a partisan gerrymander violated the state's constitution.[6]

When courts rule on constitutional questions, they operate within clear constraints. Because the power of judicial review is the power to enforce constitutional norms, the federal Constitution or its state counterpart must furnish the basis for judicial decisions. Judges are expected not to substitute their own policy views for those of other governmental bodies, nor are they to validate governmental actions that violate the constitutional norms. Moreover, in reaching their decisions, judges do not act in a vacuum. Only rarely do they consider a constitutional provision without seeking guidance from previous judicial decisions (precedents) interpreting the same provision. Both the force of precedent and the need to justify decisions as constitutionally based serve to guide and confine judges in their exercise of judicial review.

But as Chapter 8 showed, constitutional interpretation is not a merely mechanical process. Judges do not—and cannot—merely "lay the article of the Constitution which is involved beside the statute which is challenged and decide whether the latter squares with the former." Although operating within an institutional framework that circumscribes their discretion, they nonetheless "make politically controversial judgments about the law's meaning."[7] Moreover, most of the federal constitutional provisions that have generated extensive litigation are phrased in general terms. Examples include the Fourth Amendment's ban on "unreasonable searches and seizures," the Fifth and Fourteenth Amendments' requirement of "due process of law," and the Fourteenth Amendment's guarantee of "the equal protection of the laws." The generality of these phrases requires judges to look beyond the text of the Constitution to determine their meaning and application.

One source judges may look to is judicial precedents. Although judges can rely on earlier decisions interpreting a constitutional provision, the decisions do not altogether resolve the problem. In some instances, the validity of the Court's earlier rulings may be precisely what is at issue.

A famous example is *Brown v. Board of Education* (1954), challenging the constitutionality of legally mandated racial segregation in public schools.[8] If the Supreme Court had followed precedent, it would have upheld the practice of racial segregation based on its earlier decision in *Plessy v. Ferguson* (1896), which permitted states to maintain "separate but equal" facilities.[9] The ultimate touchstone of constitutionality, however, is the Constitution itself, not the precedents of the Supreme Court. Thus, judges may, as they did in *Brown*, depart from precedent when they conclude that prior cases were wrongly decided.

Finally, even when the meaning of a constitutional provision is clear, its application in the specific case may be problematic. In *Caplin and Drysdale, Chartered v. United States* (1989), for instance, all nine Supreme Court justices recognized that the Sixth Amendment guarantees criminal defendants a right to be represented by counsel at trial.[10] The justices disagreed sharply, however, about whether the federal government could confiscate assets allegedly acquired through drug trafficking when the defendant planned to use them to pay his legal fees. As these examples show, constitutional interpretation involves the exercise of judgment; and reasonable judges, equally devoted to the Constitution, can arrive at quite different understandings of the document, and often they do.

Remedial Policymaking

As the earlier reference to *James v. Wallace* suggests, judicial involvement in constitutional cases may extend beyond determining whether the Constitution has been violated. Once a constitutional violation is discovered, it must be remedied. "Remedial policymaking" refers to the judicial imposition of requirements on officials to eliminate unconstitutional conditions or practices.

In most cases, judges need only order officials to stop their unconstitutional conduct and refrain from it in the future. Thus, in *Reed v. Reed* (1971), its first major ruling on gender discrimination, the Supreme Court ruled that Idaho (and other states) could no longer give an automatic preference to men over women as administrators of estates, and this sufficed to dispose of the problem.[11] But when government fails to meet its constitutional obligations, judges may also direct that specific remedial actions be undertaken. Abram Chayes describes what is distinctive about such judicial involvement: "[The judge's decree] seeks to adjust future behavior, not to compensate for past wrong. It is deliberately fashioned rather than logically deduced from the nature of the legal harm suffered. It provides for a complex, ongoing regime of performance rather than a simple, one-shot, one-way transfer … [I]t prolongs and deepens, rather than terminates, the court's involvement with the dispute."[12] As

Chayes suggests, remedial policymaking can involve judges in prolonged and detailed supervision of public facilities. Judge Johnson's ruling in *James v. Wallace*, for example, required that the prison hire a nutrition consultant and even prescribed the maximum number of inmates per toilet. Such judicial intervention can occur even if courts do not assume immediate policymaking responsibility. In *Brown v. Board of Education* [*Brown* II] (1955), the Supreme Court required school districts to take affirmative steps to eliminate racial segregation in their schools.[13] The Court, however, left it up to the various school districts to determine how best to implement this requirement. Federal district court judges could intervene only if districts failed to meet their constitutional responsibility to desegregate their schools. Nevertheless, the refusal of many states and communities to comply with *Brown* compelled federal judges to devise and impose their own school desegregation plans.

Sometimes courts rule that an unconstitutional situation exists but refrain from announcing a remedy. For example, in *Robinson v. Cahill* (1972), the New Jersey Supreme Court ruled that the state's system of school finance violated the New Jersey Constitution but left it to the governor and legislature to devise a replacement.[14] Although this approach puts an issue on the political agenda and gives the other branches of government an opportunity to act, it succeeds only if the political authorities step up to meet their constitutional responsibilities.

Although the federal or state constitution might provide the basis for invalidating government actions, it offers little guidance as to how best to remedy unconstitutional practices or their effects. Thus, as Chayes notes, judges seeking to remedy constitutional violations necessarily exercise considerable discretion. To determine whether a judge has acted appropriately, one must consider the effectiveness of the judge's approach and whether it inappropriately intrudes on the powers of other branches of government.

Statutory Interpretation and Judicial Policymaking

Although constitutional cases receive the most attention, they constitute a small portion of most courts' caseloads. Judges are more often involved in enforcing legislative mandates than in invalidating them. The judge deciding a criminal case must determine whether what the defendant has done violates the criminal law. Judges in civil cases often must apply statutes in reaching their decisions. Thus, the responsibility to "say what the law is" frequently requires the judge to determine the meaning of legislative enactments and how they apply in specific cases.

This responsibility appears to provide little occasion for judicial policymaking. Most disputes are of interest only to the litigants themselves. Even when a dispute has broader implications, the legislature has supplied the standard for resolving it by enacting the statute. Because statutes are designed to serve particular purposes, they can—at least in theory—state precisely the aims to be achieved and the means for their achievement. Thus, in cases involving statutory interpretation, the courts' function may appear to be distinctly subsidiary: to determine what the law means and to decide cases in line with that meaning. Even when statutes are unclear, the responsibility of the judge is to act as the faithful agent of the legislature, to uncover the policy set by the legislature.

But this picture is too simple. Litigants often disagree on the meaning of a statute or its application, and thus deciding the case obliges the judge to choose between competing interpretations of the law proposed by the parties to the case. Frequently, the judge's choice, which is necessary to resolve the specific dispute, can have much wider effects. Indeed, one critic of judicial policymaking has charged that judges have all too often "embark[ed] on ambitious ventures of judicial reform in the name of statutory construction."[15] To understand how the judicial responsibility to interpret the law enmeshes judges in policymaking, let us examine why conflicts arise over the interpretation of statutes.

Disputes about the meaning of a statute may arise if its provisions are unclear or appear to conflict with one another. Sometimes this lack of clarity may be inadvertent—the result of poor draftsmanship or inconsistent amendments added during legislative consideration of the measure. Sometimes, however, statutory ambiguity may reflect the technical complexity of the subject matter, or what Justice Felix Frankfurter once referred to as "the intrinsic difficulties of the language."[16] And, sometimes, unclear statutes may result from legislative efforts to avoid controversial policy choices by settling on broad and general terms that reflect an "agreement on language but not on substance."[17] For example, Title VII of the Civil Rights Act of 1964 outlaws discrimination in employment on the basis of race, color, religion, sex, or national origin but fails to define discrimination. Thus the legislation's supporters were able to avoid divisive issues, such as whether discrimination must be intentional, and whether affirmative action is permissible under the statute. The resolution of these difficult questions was left to the courts, which were obliged to give meaning to the ambiguous provisions in the course of resolving legal disputes.

Disputes may also arise over whether a law applies to situations not contemplated by those who enacted the legislation. *Mortensen v. United States* provides a classic example.[18] Mr. and Mrs. Mortensen operated a (legal) house of prostitution in Grand Island, Nebraska. When they traveled to Salt Lake City to visit Mrs. Mortensen's parents, they took two of their employees along for the trip. After the vacation, they drove back to Nebraska, where their employees resumed work. The Mortensens were subsequently prosecuted under the Mann Act, a federal statute that forbade transporting women across state lines "for the purpose of prostitution or debauchery, or for any other immoral purpose." Clearly, the authors of the Act never imagined the Mortensens' situation; the authors were primarily concerned with preventing the coercion of young women into prostitution. Nevertheless, the government argued that when the Mortensens brought their employees back to work, they were, in fact, transporting them across state lines for the purpose of prostitution. However, the U.S. Supreme Court disagreed, overturning the Mortensens' conviction by a 5–4 vote.

Social and technological changes may also produce situations that not even the most farsighted legislator could have anticipated. *Diamond v. Chakrabarty* (1980) illustrates how such changes may provide occasions for judicial policymaking.[19] Chakrabarty had created a living microorganism under laboratory conditions and applied for a patent for his invention. Not surprisingly, when Congress enacted the current patent law in 1952, it never considered whether living organisms could be patented, and nothing in the law directly permitted or forbade the patenting of living organisms. The Supreme Court was therefore called on to determine whether the broad language of the patent law, reflecting an intention to reward ingenuity and invention, extended to the creation of such organisms. As the Court recognized, its decision could significantly influence whether genetic research was "accelerated by the hope of reward or slowed by the want of incentive."[20] In ruling in favor of Chakrabarty and permitting the patenting of microorganisms, the Court made important policy, but it did so by fulfilling its responsibility to interpret and apply the law.

Disputes may also arise over how a statute affects earlier legislation. Although the legal principles governing such situations are clear, their application can lead to disputes. One principle is that if a new congressional or state statute is inconsistent with an existing one, then the more recent enactment supersedes the earlier one. Unless, however, the legislature clearly indicates its intention to supersede an earlier enactment, or unless two laws directly conflict, courts may be asked to determine whether the laws are, in fact, inconsistent.

Another principle is that congressional legislation "preempts," or supersedes, inconsistent state legislation. But Congress rarely indicates how its enactments relate to existing state legislation. Thus, when Congress enters a field dominated by state legislation, courts often must determine whether the state law has been preempted. Similarly, when states legislate in an area in which congressional legislation exists, litigation often arises. For example, in 2011 the U.S. Supreme Court by a 5–4 vote held that a controversial Arizona law penalizing the employment of illegal immigrants was not preempted by federal immigration law.[21]

Oversight of Administrative Activity and Judicial Policymaking

Since the early twentieth century, the size of the federal and state governments and the scope of their activities have increased dramatically. A major expansion in administrative policymaking has accompanied this growth in government. Administrative agencies “legislate” through their power to issue regulations that further define legislative mandates and have the force of law. Agencies “adjudicate” through their power to determine whether people or organizations have violated any laws or regulations. And, through their power to award or withhold authorizations and licenses and to establish and enforce eligibility requirements for government benefit programs, agencies control the distribution of important economic goods. Challenges from those injured by administrative policymaking have created new opportunities for judicial policymaking.

Just as litigants may challenge the constitutionality of legislative enactments, so may they also challenge the constitutionality of administrative actions. But when litigants claim that an agency has exceeded its legal authority, usually the basis for the claim is statutory rather than constitutional. Because an agency can make policy only in pursuance of its statutory mandate, litigants may claim that an agency’s action is inconsistent with its mandate. The courts must then determine whether the agency has exceeded its authority or has adopted policies that are consistent with its authorizing legislation. This was the issue when the federal Food and Drug Administration (FDA) issued regulations dealing with the marketing of tobacco products in 1996. Tobacco companies sued, asserting that Congress had never given the FDA authority to regulate tobacco products, and the U.S. Supreme Court agreed, invalidating the agency’s regulations.[22] More recently, the Supreme Court has embraced the “major question doctrine,” under which if an administrative agency seeks to address an issue of major national importance, its action must be supported by clear congressional authorization. In 2021 a sharply divided Court relied on this doctrine to strike down the Centers for Disease Control and Prevention’s nationwide eviction moratorium during the COVID pandemic, and a year later it again relied on the doctrine to strike down an Environmental Protection Agency’s regulation of greenhouse gas emissions as not authorized by the Clean Air Act.[23]

In other instances, the challenge may be to administrative inaction rather than administrative action. If a law imposes responsibilities on an agency, a litigant may charge that the agency has failed to carry out its responsibilities. The agency’s failure may involve total inaction. More frequently, the issue is whether the agency has responded adequately to the legislative mandate. In *Allen v. Wright*, for example, a group of parents sued the Internal Revenue Service, alleging that it had not adopted sufficient standards and procedures to fulfil its obligation to deny tax-exempt status to racially discriminatory private schools.[24] In such cases, judges must also analyze the statutory requirements imposed on governmental agencies.

Even if an agency has statutory authorization for its actions, litigants may challenge the processes by which the agency arrived at its policy. This is a particularly fertile basis for litigation. The Administrative Procedure Act, enacted by Congress in 1946, specifies the basic procedures that federal agencies must follow in their rulemaking. Subsequent statutes have multiplied procedural requirements, and many agencies have supplemented these statutory requirements with their own rules of procedure. Even when litigants have been reluctant to challenge agencies' policy determinations, recognizing that they lack the technical expertise to evaluate agency assessments, they have been willing to intervene to ensure procedural regularity. Judicial rulings on procedural issues can often have important policy consequences by requiring agencies to delay or reconsider their actions. Take, for example, the requirement under the National Environmental Protection Act that all agencies prepare an environmental impact statement for any proposal for legislation or "major federal action." Environmental groups have used this requirement as a weapon to delay or seek modifications in projects they oppose by filing suits that challenge the failure to file impact statements or the adequacy of those that were filed.

As administrative policymaking has expanded, so has judicial intervention designed to ensure that agencies observe the substantive and procedural requirements imposed on them. This intervention has inevitably enmeshed courts in policy disputes and has led them to issue rulings that affect public policy.

The Common Law and Judicial Policymaking

Constitutions, statutes, and administrative regulations furnish legal standards for judges to apply when they decide cases. But the scope of these laws, although vast, is hardly comprehensive. Thus, when a dispute arises regarding, say, whether A is liable for injuries that B has suffered, a judge typically cannot look to the other branches of government for applicable legal standards. Instead, the judge must, in the course of resolving the dispute, establish the law that will govern it. As previously noted, this body of judge-made law, which developed to resolve legal conflicts in the absence of legislative or executive enactments, is termed the common law.

Although courts make policy through their decisions enunciating the common law, several factors serve to channel and control such policymaking. Judges have only limited discretion when they devise common-law legal policy—they are not free simply to incorporate their own policy preferences into law. The common law, as the term itself implies, is to reflect the values and practices of the community. As noted in Chapter 1, when the common law originated in England, judges drew their standards directly from the common practices of the society. As the body of judicial decisions elaborating these societal standards grew, recourse to legal precedent gradually replaced the direct invocation of community standards. Today, courts generally rely on precedent to decide common-law cases. This reliance on precedent, fortified by the doctrine of *stare decisis*, ensures continuity in the law and limits the range of judicial discretion.

The common-law principles that a court announces have only limited authority. When a state supreme court announces a principle of common law, it does so in the course of deciding a particular case. When subsequent cases arise that appear similar to the initial case, the court must decide whether to extend, modify, or abandon the principle it announced. Thus, the common law is established not so much by an individual decision as by an accumulation of decisions dealing with a particular area of the law. A state court's decision may constitute authoritative precedent within the state, but its acceptance beyond the state's borders depends not on the authority of the court but on the persuasiveness of the arguments supporting its decision, particularly when a court departs from established principles and charts a new direction. Although the common law is dynamic rather than static, decisive breaks with the past are rare. Change in the common law is usually incremental, a case-by-case modification of legal standards in response to shifts in the character and values of the society. At each step of the process, the movement can be halted or reversed if it appears to be heading in the wrong direction.

Ultimately, these constraints channel rather than prevent judicial policymaking: Courts inevitably make policy in their interpretation and development of the common law, and this is not necessarily undesirable. The legal principles that were appropriate for the largely agrarian nation of the eighteenth century could hardly serve the legal needs of the twenty-first century. Social and technological changes have created new problems that require the courts to extend or modify common-law principles. New social relationships have developed that must be taken into account in applying common-law principles. New aspirations have emerged, and the law must be sufficiently flexible to permit their fulfilment.

In sum, the courts' responsibility to resolve disputes in the absence of legal enactments obliges them to make law. Although no single court or decision establishes policy, legal standards emerge from the multiplicity of common-law rulings that judges are called on to make. Although change is typically gradual and may in some instances only be discernible in retrospect, the common law must be dynamic to serve the needs of a changing society. These changes in the common law generally grow out of changes in the broader society. At the same time, the courts' decisions can also encourage or retard societal trends. Common-law policymaking thus both reflects and affects American society.

Cumulative Policymaking

Although some cases raise important policy issues, most court cases involve more mundane disputes of concern only to the disputants. No new legal principles emerge from these cases, and the societal impact of individual decisions is minimal. Yet one should not distinguish too sharply between the few decisions that announce new policy and those decisions that make up the bulk of court business. For although the relatively routine cases, taken individually, may be relatively insignificant, they may in the aggregate embody important policy choices.

Judges may have broad discretion in resolving these more mundane disputes. Ordinarily, judges decide cases by applying the law. But at times society's sense of justice cannot readily be reduced to precise rules, so the legislature merely announces a general standard and relies on judges to use their discretion to do justice on a case-by-case basis. The state's policy thus is not defined by legislative mandate; it emerges instead from the totality of judicial decisions, a process known as cumulative policymaking.

Sentencing in criminal cases illustrates this sort of cumulative policymaking. Until the imposition of sentencing guidelines (see Chapter 6), criminal law in the United States tended to define the minimum and maximum penalties for various offenses—for example, 5–10 years' imprisonment for armed robbery—but allowed the judge considerable discretion in sentencing within those guidelines. Although the sentence meted out to an individual offender does not establish policy, the overall pattern of sentencing in criminal cases does constitute important policymaking, because it reveals how the society regards various crimes. The lower sentences imposed for possession of marijuana during the late 1960s, for example, indicated a change in societal standards even before state legislatures acted to reduce or eliminate penalties. In addition, a comparison of the sentences meted out to members of various racial and economic groups provides one indication of the society's commitment to equal justice. Charges of racial bias in sentencing and complaints about judges who are "soft on crime," whether justified or not, show that cumulative policymaking can be highly controversial.

A second example of cumulative policymaking is child custody awards in contested divorce cases. When parents cannot agree on a custody arrangement, trial court judges determine which parent shall retain custody, or whether joint custody shall be awarded. Although the judge's ruling is to serve the "best interests of the child," this vague standard encourages the exercise of judicial discretion. Once again, the decision in individual cases may be of concern chiefly to the contending parties. But the cumulative effect of those decisions defines how the society weighs the various factors that might be considered in determining the child's "best interests." During the early twentieth century, for example, judges—rhapsodizing that "there is but a twilight zone between a mother's love and an atmosphere of heaven"—consistently supported maternal claims for custody.[25] But in recent decades fathers have become more willing to seek custody and more successful in obtaining it, and judges have been more willing to award joint custody to divorcing parents. As these changes suggest, cumulative policymaking both responds to and influences broader societal developments.

Cumulative policymaking thus occurs when a series of decisions in essentially similar cases in effect defines policy in a given area. Although legislation or rulings by appellate courts may circumscribe the range of judicial choice, trial judges often retain considerable leeway in deciding individual cases. When they exercise this discretion, judges rarely announce broad policy standards. Indeed, they may give little consideration to the broader policy that their decisions create. Nonetheless, the results of their decisions define the policy of the state.

THE INCIDENCE OF JUDICIAL POLICYMAKING

The Level of Judicial Policymaking

Although judicial policymaking is not a recent phenomenon, judges are more involved in policymaking today than in the past. What accounts for this? It may be that judges today are more willing, even eager, to participate in policymaking than were judges in earlier eras. Recognizing this, groups may also be more willing to use the courts to advance their policy objectives.[26] But the primary reason for increased judicial policymaking may simply be that there is now more law and more litigation of policy disputes.

At one time, many state constitutions mandated that the state legislature meet only every other year and limited the length of legislative sessions. Today, most state legislatures meet annually, for a longer period, and enact more laws. Except when its members are campaigning for reelection, Congress is almost continually in session. Perhaps the biggest change, however, involves administrative rulemaking. The creation of regulatory agencies beginning in the twentieth century produced an explosion of federal rules and regulations. Because this increase in law has created new rights and responsibilities, it has stimulated litigation. Many of these cases do not involve judicial policymaking. Judges merely enforce preexisting legal standards, and the outcomes of the cases are of consequence only to the litigants. But some of these cases create new opportunities for—and indeed, may oblige judges to engage in—judicial policymaking.

HISTORICAL SHIFTS IN JUDICIAL POLICYMAKING

Constitutional Policymaking

The twentieth and twenty-first centuries have been the main period of constitutional policymaking in the United States. The U.S. Supreme Court invalidated only two federal laws and 34 state laws before 1860. Over time, however, state and federal courts have become more active in overturning legislative enactments. More than half of the congressional statutes and more than 40 percent of the state statutes that have been declared unconstitutional have been invalidated since 1960. And since the 1970s, state courts have shown an increasing willingness to strike down statutes that violate state declarations of rights.

Remedial Policymaking The imposition of detailed plans of action to remedy constitutional violations began in the 1950s with the effort to implement *Brown v. Board of Education*, the Supreme Court's school desegregation decision, and continued as courts became more involved in supervising the operations of governmental institutions such as prisons and school systems.

Statutory Policymaking As the volume of federal and state legislation increased during the twentieth century, so did litigation over its interpretation and the level of statutory policymaking by judges. Equally important was a change in the character of legislation. During the nineteenth century, federal statutes primarily involved the distribution of benefits to citizens (e.g., the Homestead Act, which made public lands available to settlers), and such legislation rarely provoked disputes. Beginning in the twentieth century, however, statutes substantially expanded the scope of federal and state regulation of private conduct, and this in turn prompted challenges by those affected by the regulatory legislation. Often these disputes over the interpretation and application of regulatory statutes have wound up in the courts.

Oversight of Administrative Agencies Although some state regulatory agencies were created during the nineteenth century, most federal administrative agencies were established in bursts of creative energy during the Progressive Era (roughly 1900–1920), the New Deal (1933–1940), and the Great Society period (roughly 1963–1970). The establishment of new agencies prompted increased administrative activity and expanded judicial involvement in overseeing that activity.

Common-Law Policymaking During the nation's first century, when most American law was enunciated by courts rather than enacted by legislatures, common-law policymaking was the most important judicial policymaking. From 1800 to 1870, U.S. courts introduced important innovations in the common law. Judges adapted English common-law doctrines to the more democratic and egalitarian society found in the United States. They also eased and encouraged the transition from an agrarian society to a more industrialized one.[27]

During the twentieth century, the scope of the common law contracted as statutes and administrative regulations replaced common law in fields such as employer–employee relations. However, since the mid-twentieth century, state appellate courts have introduced revolutionary changes in tort law, the law governing liability for injuries that one has caused (see Chapter 11).

Cumulative Policymaking Cumulative policymaking has taken place throughout the nation's history.

The Agenda of Judicial Policymaking

As American society changes, so do the sorts of issues that come before the courts; and the focus of judicial policymaking shifts in turn. The changing agenda of the U.S. Supreme Court illustrates the point. During the nineteenth century, relatively few cases that came before the Court involved constitutional issues, but today many do. Even more important are changes in the sorts of constitutional issues the Court addresses. Before the Civil War, constitutional cases usually involved disputes about the respective spheres of the national and state governments. After the Civil War, industrialization and the growth of large corporations prompted governmental efforts to deal with those developments, and the Court's constitutional agenda focused on the scope of federal and state power to regulate economic enterprises. After the late 1930s, when the Court recognized broad federal and state authority to regulate economic matters, it became most involved in delineating the scope of constitutional rights. Beginning in the 1980s, although continuing to hear rights cases, the Court sought to provide greater protection for federalism by restricting the scope of federal power and emphasizing states' immunity from civil suits. More recently, it has addressed several cases arising from presidential initiatives and governmental policies in the aftermath of 9/11, the wars in Afghanistan and Iraq, and the COVID pandemic.

The policymaking agendas of other courts also reflect societal changes. Thus a study of the dockets of state supreme courts over a 100-year period found a shift from commercial to noncommercial cases and concluded that the courts "seem to be less concerned with the stabilization and protection of property rights, more concerned with the individual and the downtrodden, and more willing to consider rulings that promote social change."[28] A similar study of federal courts of appeals concluded that criminal cases and cases involving the federal government have risen dramatically, confirming the importance of legislation in stimulating litigation. Whereas private economic disputes dominated the dockets of courts of appeals early in the twentieth century, such disputes constitute a much smaller proportion of the courts' caseloads today.[29]

ASSESSING JUDICIAL POLICYMAKING

Criteria for Evaluation

Most people evaluate judicial policymaking based on the substance of the policy, not its legal basis. That is, they praise judicial policies that they favor, and condemn those they dislike, without distinguishing between courts and other political institutions. Thus, if they are pro-life, they applaud Supreme Court rulings that restrict abortion, whereas if they are pro-choice, they deplore those same rulings.

This section, however, focuses on two other criteria for evaluating judicial policymaking: legitimacy and capacity (policy effectiveness). To determine whether a judicial decision that enunciates policy is legitimate, we must ask: Is the issue one that judges may properly address, and is there an adequate legal basis for the court's position? Note that the answer to this question might not coincide with our policy views. We might condemn as illegitimate a judicial ruling that advances a policy we favor; alternatively, we may acknowledge another judicial ruling as legitimate, even while deploring the specific policy announced by the court.

To assess judicial policymaking in terms of judicial capacity or policy effectiveness, we ask a different question: Has the policy announced by the court succeeded in achieving its goals? Applying this criterion, we evaluate court-ordered busing by examining whether it, in fact, promoted racial integration in schools (see Chapter 10). Or we evaluate the exclusionary rule by analyzing whether it, in fact, deters police misconduct (see Chapter 6). Let us turn first to the issue of judicial policymaking capacity.

Judicial Capacity and Policy Effectiveness

Every governmental institution has its own characteristic way of defining and dealing with policy issues. The approach used reflects the background and expertise of the policymakers, the factors they consider in making their policy decisions, and the resources they command to ensure that their policies are carried out. Some critics have charged that, compared to other governmental bodies, courts are relatively ill-equipped to devise and implement policy. Donald Horowitz, a well-known critic, identifies several problems with judicial policymaking.[30]

Timeliness of Addressing Problems Timing is important in successful policymaking. If a problem is addressed too early, without adequate understanding of its dimensions or the range of possible solutions, remedial efforts are unlikely to succeed and may merely produce other problems. But if a problem is addressed too late, it may be more difficult to solve.

Courts do not control when they will confront policy issues, because they do not control their own agendas. Rather, they must wait for litigants to bring policy issues before them for resolution. With the exception of the U.S. Supreme Court—and, to a lesser extent, some state supreme courts—they cannot decline to hear properly brought cases, even if the cases raise policy issues that are not ripe for resolution. In sum, although timing may be essential to effective policymaking, it is largely a matter of chance whether courts will address problems at the time most conducive to their successful resolution.

Adequacy of Information The wisdom of policy choices often depends on the quality of the information that policymakers receive and the uses to which they put it. According to Horowitz, courts are less likely than other institutions to obtain relevant information or use it effectively.

Courts announce broad policy—for example, the inadmissibility of illegally seized evidence—in the course of deciding specific cases. This poses no difficulty if the case is representative of all the situations the court's ruling will affect. According to Horowitz, this rarely happens; courts make policy without information about many situations their policy will affect, and the result of such ill-informed policymaking is likely to be bad policy.

In addition, because courts must decide issues on the basis of law, the information they receive in legal briefs and oral argument tends to focus on legal considerations rather than on the desirability of a policy or the likely consequences of alternative approaches. Even if such information is conveyed, judges can hardly refuse to recognize a constitutional right because of doubts about its desirability. Whereas other policymakers may view policy issues in terms of alternatives or costs and benefits, courts view them in terms of legal rights and duties.

Furthermore, courts confront policy issues only in adversarial proceedings, with the issues framed as disputes between two specific parties. Although other groups and interests may be affected by the court's decision, they have no legal standing to present their views and concerns, and they may not even know about the litigation. Even when the parties do not monopolize the transmission of information, such as when other groups submit *amicus curiae* briefs, the input the court receives is typically less rich and complete than that available to a legislature or administrative agency considering a policy issue. For example, rules of evidence may keep relevant information from the court. Whereas other governmental bodies can seek out additional information on their own through legislative hearings or can commission studies on a problem, courts must rely on the information they receive through legal briefs and oral argument. Even if that information is inadequate, courts cannot decline to decide, nor can they postpone their decision.

Finally, because judges in general jurisdiction courts decide cases in a variety of fields, they approach cases that involve issues of public policy as generalists rather than as experts. In theory, this allows them to bring a fresh perspective to problems; but it also means that they lack the background that specialization in a particular field brings. Judges typically lack the ability to understand and make use of sophisticated information that is relevant to policy even when it is made available to them. Confronted with expert testimony, they lack the skills necessary to evaluate the experts' claims or, if the experts disagree, to choose among competing views. Whether the issue is the carcinogenic effects of Agent Orange, the environmental consequences of opening public lands to private development, or the operation of the internet, judges confront technical problems as amateurs. Judges often acknowledge that. Thus during oral argument in a 2023 case involving whether internet providers were liable for terrorist content that third parties posted on their sites, Justice Elena Kagan readily admitted: "We're a court. We really don't know about these things. [We are] not like the nine greatest experts on the internet."[31]

Flexibility of Response The more flexibility policymakers have in devising solutions to problems, the more likely they are to solve them.

But, according to Horowitz, courts have far fewer options than do other policymakers. Because courts must decide cases on the basis of law, they cannot impose a compromise solution on disputants, no matter how desirable such a compromise may be. Further, if people have a legal right, they have it regardless of cost, and thus cost–benefit analysis—a prime approach to contemporary policymaking—plays little role in judicial policymaking. Finally, courts have fewer means of remedying illegal situations than do other governmental institutions. They can forbid, permit, or require actions, but they can neither tax nor spend (although their orders may require expenditures by other branches). They can neither create new agencies to administer their directives nor appoint officials to oversee their implementation.

Monitoring the Effects of Decisions Once a policy is established, policymakers must monitor its implementation to ensure that the policy is carried out (compliance) and that it has its desired effects. This policy review also allows policymakers to modify their policies when earlier approaches have proven ineffective in achieving the desired results.

According to Horowitz, courts cannot effectively monitor the effects of their decisions and cannot respond to those effects as easily as can other policymakers. Instead of overseeing the consequences of their decisions, judges typically turn to other cases once they have announced a decision. When the target population for a decision is large—for example, police officers who interrogate suspects—judges cannot monitor compliance with their rulings directly. Even when the target population is small, courts often do not know if their decisions are being carried out unless affected groups bring instances of noncompliance to their attention in a new lawsuit.

A further problem plagues judicial efforts to ensure that their policies have the desired effect. Because the American legal system emphasizes adherence to precedent, courts are generally reluctant to overrule earlier decisions, particularly recent ones. Thus, courts cannot readily change course when confronted with evidence that their policy directives have failed to achieve their desired results. Even when they can determine the consequences of their decisions, respect for precedent renders judges less able than other policymakers to benefit from that information.

Evaluating Horowitz's Critique Not all observers agree that courts are ill-equipped to devise policy.[32] The recent proliferation of remedial policymaking, they claim, shows that Horowitz underestimates courts' ability to devise new approaches to deal with unfamiliar problems. They also insist that courts fare badly in Horowitz's analysis because he unfairly compares the actual operation of courts to an idealized picture of legislatures and administrative agencies. Legislators, like judges, are generalists who confront a wide array of issues with incomplete information. And, like judges, they do not control their own agendas but must address those issues on which the public demands action. For example, after the global financial crisis, legislators had to address the reform of financial institutions. In addition, legislators and administrators, like judges, have difficulty supervising the operation of their policies; the failure of policies designed to stem illegal immigration, for instance, illustrates the ineffectiveness of legislative and administrative oversight. Finally, as *Brown v. Board of Education* and the Alabama prison litigation demonstrate, the choice is often not between the courts or some other institutions addressing a problem but between judicial intervention and governmental inaction.

Some commentators also view the judges' distinctive approach to policymaking as an advantage, not a disadvantage. The emphasis on reasoned justification in judicial decision making, for example, may promote more thoughtful policy pronouncements. Furthermore, judges—especially federal judges—enjoy an independence from partisan pressures and lobbying by interest groups. Their relative insulation may enable them to pursue policies that serve the public interest rather than those offering short-term political advantage.

Finally, insofar as Horowitz's critique is accurate, it applies primarily to situations in which a judge announces broad policy in a single case. As we have seen, not all judicial policymaking fits that pattern. Common-law policymaking and cumulative policymaking generally involve an incremental, case-by-case approach. Judges usually do not announce broad policy in the course of statutory policymaking or judicial oversight of administrative activity. Horowitz's critique therefore seems particularly applicable to constitutional policymaking and remedial policymaking.

Legitimacy

Even if judges cannot altogether avoid policymaking, this does not mean that all judicial policymaking is legitimate. Judges may announce decisions that have no basis in law but merely reflect their personal policy views, or their rulings may invade the powers and prerogatives of the other branches of government. In such circumstances their rulings are illegitimate. However, people may well disagree about what constitutes an adequate legal basis for a decision or what the judiciary's proper role is in governing a democratic society. Indeed, throughout the nation's history, the scope of judicial authority has sparked fierce debate.

In recent years the popular debate has often been framed in terms of "judicial activism" versus "judicial restraint." Yet, because these terms are so often used polemically, their meaning is far from clear. Political scientist Bradley Canon has catalogued the various uses partisans make of these terms. Some view as activist rulings that negate policies adopted through democratic process. Others denounce as activist rulings that announce detailed policy prescriptions or make substantive policy rather than merely preserving the democratic process. Still others criticize rulings as activist if they depart from either earlier court decisions or (in their view) the original understanding of the Constitution.[33]

Canon's listing underscores the limitations and confusions in the contemporary debate over judicial activism and restraint. Most obviously, as Canon points out, the criteria for activism and restraint apply best to constitutional policymaking. Statutory policymaking, oversight of administrative activity, and cumulative policymaking do not overturn legislation, and common-law policymaking can be overturned by legislation.

Even if one limits oneself to constitutional policymaking, the distinction between activism and restraint is problematic, because decisions may be activist in some respects and restrained in others. When the U.S. Supreme Court reversed course in 1937 and began to uphold New Deal legislation, its rulings were activist in that they overruled precedent but restrained in that they upheld congressional legislation.[34] Similarly, the Court in *Brown v. Board of Education* rejected the prevailing standard of "separate but equal" and overturned laws in several states but arguably did so to bring the interpretation of the equal protection clause in line with the clear implications of its language. Indeed, the concept of judicial restraint "conflates two quite different ideas: the principle that judges should faithfully interpret the Constitution as written, and the principle that judges should defer to elected officials."[35] Thus, depending on the criteria employed, such rulings could be characterized as either activist or restrained.

The main problem with discussions of judicial activism and restraint, however, is that they distract attention from the primary question in assessing the legitimacy of judicial policymaking: Are the court's rulings legally defensible? Judicial policymaking is legitimate, whether or not it overturns congressional statutes and judicial precedents, if the court's ruling is consistent with the text and intention of the provision being interpreted. Conversely, a judicial decision is illegitimate if it follows precedent or upholds legislation when fidelity to the Constitution demands their invalidation. Of course, acceptance of interpretive fidelity as the primary criterion does not eliminate disputes. Judges disagree, often vehemently, about how to interpret constitutional provisions and other legal texts. Commentators constantly debate whether courts have adequately justified their rulings. Chapter 8 suggested why such disagreements occur even among judges committed to the disinterested interpretation of the law.

CONCLUSIONS

This chapter has sought to dispel several myths about judicial policymaking. One myth is that judicial policymaking necessarily involves a judicial usurpation of power. At times this may be true but, generally speaking, judicial policymaking is the unavoidable result of judges' fulfilling their responsibility to decide cases in accordance with the law. In the course of making decisions, judges interpret constitutions and statutes, oversee the actions of administrative agencies, and elaborate the common law. The decisions they render have policy consequences, often regardless of how they rule, and thus judges are unavoidably involved in public policy development.

A second myth is that the growth of judicial policymaking reflects an effort by activist judges to exercise power. Although there may be individual judges who have abused their positions, more seems to be involved than the character of the judges. After all, years of judicial appointments by Presidents Reagan, George H. W. Bush, and George W. Bush—all of whom expressed fervent opposition to judicial activism—did not eliminate judicial policymaking. Rather, government expansion and an ever-growing body of law are primarily responsible for judicial policymaking, not the composition of the judiciary.

A third myth is that judicial policymaking is necessarily undemocratic, because the will of the judge prevails over the will of the populace. But in fact much judicial policymaking does not place courts at odds with the popular will. In statutory policymaking and judicial oversight of administrative agencies, judges are presumably giving effect to, rather than overriding, the will of the legislature. In common-law policymaking, they are acting in the absence of legislation; and in cumulative policymaking, they are exercising discretion within bounds set by the legislature. Constitutional policymaking sometimes places judges at odds with legislatures, but often the judges invalidate actions of officials—for example, police officers—who are themselves not directly accountable to the public. Finally, in remedial policymaking, judges sometimes displace other policymakers, but typically they do so only when those policymakers have failed to act to meet constitutional requirements.

Yet judicial policymaking is not beyond criticism. Judges at times exceed their legitimate powers, render unwise decisions, or announce policies that fail to achieve their objectives. To understand and assess judicial policymaking, however, one must look closely at how judges reach their decisions and at the effects their decisions actually have. Thus, Chapter 10 examines in detail federal court policymaking on two important issues: school desegregation and abortion. Chapter 11 looks at state court policymaking involving school finance, same-sex marriage, election law, and product liability. Both chapters also highlight how federal and state courts interact in the development of public policy.

NOTES

1 The quotation is from Chief Justice John Marshall's opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173 (1803), the first instance of the Supreme Court striking down a federal law as unconstitutional.

2 *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

3 *United States v. Nixon*, 418 U.S. 683 (1974).

4 *James v. Wallace*, 382 F. Supp. 1177 (M.D. Ala. 1974); *James v. Wallace*, 406 F. Supp. 318 (M.D. Ala. 1976).

5 Tinsley E. Yarbrough, *Judge Frank Johnson and Human Rights in Alabama* (Tuscaloosa, AL: University of Alabama Press, 1981).

6 *Goodridge v. Department of Public Health*, 798 N.E. 2d 941 (Mass. 2003); *Harper v. Hall*, 868 S.E.2d 498 (N.C. 2022).

7 The first quotation is from Justice Owen Roberts's opinion for the Court in *United States v. Butler*, 297 U.S. 1 (1936), and the second from Christopher L. Eisgruber, *The Next Justice: Repairing the Supreme Court Appointments Process* (Princeton, NJ: Princeton University Press, 2007), p. 96.

8 *Brown v. Board of Education*, 347 U.S. 483 (1954).

9 *Plessy v. Ferguson*, 163 U.S. 537 (1896).

10 *Caplin and Drysdale, Chartered v. United States*, 491 U.S. 617 (1989).

11 *Reed v. Reed*, 404 U.S. 71 (1971).

12 Abram Chayes, "The Role of the Judge in Public Law Litigation," *Harvard Law Review* 89 (1976): 1298.

13 *Brown v. Board of Education* [*Brown* II], 349 U.S. 294 (1955).

14 *Robinson v. Cahill* [*Robinson* I], 303 A.2d 273 (N.J. 1973); *Robinson v. Cahill* [*Robinson* II], 339 A.2d 193 (N.J. 1975).

15 Donald L. Horowitz, *The Courts and Social Policy* (Washington, DC: Brookings, 1977), p. 13.

16 Justice Felix Frankfurter, "Some Reflections on the Reading of Statutes," *Record of the Association of the Bar of the City of New York* 2 (1947).

17 Quotation attributed to the director of the House legislative counsel's office, quoted in Sol M. Linowitz with Martin Mayer, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* (New York: Charles Scribner's Sons, 1994), p. 224.

18 *Mortensen v. United States*, 322 U.S. 369 (1944).

19 *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

20 Ibid., p. 317.

21 *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011).

22 *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), and, more generally, Martha A. Derthick, *Up*

in Smoke: From Legislation to Litigation in Tobacco Politics, 2nd ed. (Washington, DC: CQ Press, 2004). an

23 *Ala. Ass'n of Realtors v. HHS*, 594 U.S. ___ (2021); *West Virginia v. EPA*, 597 U.S. ___ (2022).

24 *Allen v. Wright*, 468 U.S. 737 (1984).

25 *Tuter v. Tuter*, 120 S.W.2d 203, 205 (Mo. Ct. App. 1938).

26 This phenomenon is not limited to the United States—see Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago, IL: University of Chicago Press, 1998).

27 William E. Nelson, *Americanization of the Common Law* (Cambridge, MA: Harvard University Press, 1975); Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, MA: Harvard University Press, 1977).

28 Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman, and Stanton Wheeler, "The Business of State Supreme Courts, 1870–1970," *Stanford Law Review* 30 (November 1977): 155.

29 Lawrence Baum, Sheldon Goldman, and Austin Sarat, "The Evolution of Litigation in the Federal Courts of Appeals, 1895–1975," *Law and Society Review* 16 (1981–1982): 291–309.

30 Horowitz, *The Courts and Social Policy*.

31 Oral argument in *Gonzalez v. Google* (21 February, 2023).

32 See Ralph Cavanagh and Austin Sarat, "Thinking about Courts: Toward and Beyond a Jurisprudence of Judicial Competence," *Law and Society Review* 14 (Winter 1980): 371–420; and Stephen L. Wasby, "Arrogation of Power or Accountability: Judicial Imperialism Revisited," *Judicature* 65 (October 1981): 208–219.

33 Bradley C. Canon, "A Framework for the Analysis of Judicial Activism," in *Supreme Court Activism and Restraint*, Stephen C. Halpern and Charles M. Lamb eds. (Lexington, MA: Lexington Books, 1982), pp. 386–387.

34 *National Labor Relations Board v. Jones and Laughlin Steel Corporation*, 301 U.S. 1 (1937), which overturned such rulings as *United States v. E. C. Knight Company*, 156 U.S. 1 (1895), and *Carter v. Carter Coal Company*, 298 U.S. 298 (1936).

35 The quotation is from Eisgruber, *The Next Justice*, p. 49.

10

Federal Court Policymaking

This chapter examines how federal courts have dealt with the issues of school desegregation and abortion. Although no account of federal court policymaking can claim to be comprehensive, given the variety of policy issues federal courts address, the Supreme Court's rulings on these issues, as well as the reactions to them, illustrate key features of federal court policymaking. The chapter considers (1) the process by which these policy issues were transformed into legal disputes and brought before the courts for resolution, (2) how federal court policy on these issues has developed, (3) the interplay between judicial rulings and the political process, and (4) how effective the federal courts have been in achieving their policy objectives.

SCHOOL DESEGREGATION

Brown v. Board of Education is probably the Supreme Court's most celebrated ruling.[1] Before *Brown*, the Supreme Court's record on racial injustice was best exemplified by the infamous Dred Scott case and by *Plessy v. Ferguson* (1896), in which the Court upheld racial segregation under the doctrine of "separate but equal."[2] In *Brown*, the Court repudiated its dismal past and enshrined racial equality as a fundamental constitutional principle. Proclamation of this principle, however, did not dispel disagreement about its meaning or ensure its acceptance. This section examines the Supreme Court's constitutional policymaking on school desegregation and the remedial policymaking of lower federal courts charged with implementing *Brown*. Table 10.1 provides a chronology of the Supreme Court's most important desegregation rulings.

DOI: 10.4324/9781003440055-13

TABLE 10.1 Major Supreme Court Rulings on School Desegregation

Case	Ruling
Brown v. Board of Education (*Brown* I, 1954)	Declared that state-mandated racial segregation in public schools violated the equal protection clause
Brown v. Board of Education (*Brown* II, 1955)	Required local school districts to dismantle their dual school systems with "all deliberate speed"
Green v. County School Board of New Kent (1968)	Required local school districts to devise plans that would *immediately* promote racial integration
Swann v. Charlotte-Mecklenburg Board of Education (1970)	Upheld a variety of remedies, including busing, as means to promote school desegregation
Keyes v. School District No. 1, Denver, Colorado (1973)	Held that the use of racial considerations in drawing attendance zones, assigning teachers, and siting new schools violated *Brown* and justified imposition of a desegregation plan
Milliken v. Bradley (*Milliken* I, 1974)	Held that courts could not order inter-district busing without evidence that suburban districts had acted to promote racial segregation in schools
Milliken v. Bradley (*Milliken* II, 1977)	Ruled that a district court could order a state to pay for programs to remedy the educational harms inflicted by segregation in a district whose racial composition precluded meaningful racial integration
Oklahoma City v. Dowell (1991)	Ruled that once a district complied with a court-ordered desegregation decree and eliminated vestiges of past discrimination, it had dismantled its dual school system and was no longer obliged to undertake desegregation measures
Parents Involved in Community Schools v. Seattle School District, No. 1 (2007)	Ruled that school districts could not use race in determining what schools students would attend, even if the aim was to promote racial diversity in those schools

The Road to *Brown*

Brown represented the culmination of a litigation campaign designed to overturn the system of racial segregation endorsed in *Plessy v. Ferguson*.[3] The Legal Defense Fund of the National Association for the Advancement of Colored People (NAACP) spearheaded the fight against segregation under the direction of Charles Houston and, later, Thurgood Marshall. During the early 1930s, when the NAACP began its campaign, *Plessy* was firmly established, precluding a frontal assault on the "separate but equal" doctrine. But Houston believed that a long-term strategy of undermining segregation could succeed. The Legal Defense Fund began by bringing before the courts particularly egregious denials of equality—not only to combat particular injustices, but also to mobilize support for the NAACP's fight for racial equality and to inform the judiciary about the evils of segregation.

Public education was a particular concern. The Southern states had eagerly accepted *Plessy*'s invitation to institute racial separation, requiring white and black students to attend separate schools, but had ignored Plessy's requirement of equality. In the 1920s, for example, Georgia spent eight times as much on white students as it did on African American students, and Mississippi five times as much. The NAACP Legal Defense Fund enjoyed immediate success in challenging segregation in graduate and professional schools. Because fewer students were involved, challenges to segregation at the graduate level aroused less controversy. Denials of equality at that level were also easier to document. Because all states operated elementary and secondary schools for African Americans, a successful constitutional challenge required a detailed demonstration of inequalities between the white and black schools. In contrast, many states did not offer graduate programs for African American students, and thus their refusal to admit qualified black applicants to existing programs violated the requirement of equality. During the years before *Brown*, the U.S. Supreme Court upheld several challenges to educational inequalities in graduate and professional schools.[4] These victories paved the way for a direct attack on racial segregation in *Brown*.

The series of cases leading to *Brown* may resemble a carefully plotted campaign, with central direction on the course and pace of litigation. So other groups—for example, women's groups and environmental groups—looked to these cases for a model of how to pursue policy ends through the courts. But the Legal Defense Fund's campaign was less systematic than hindsight may suggest. Although the aim of eliminating racial subordination never changed, the Legal Defense Fund litigated cases in a variety of fields, often attacking targets of opportunity rather than pursuing a long-term plan. As favorable precedents accumulated in school cases, the Legal Defense Fund decided to concentrate more attention on school desegregation. In the view of legal scholar Mark Tushnet, "If the military metaphor referring to a litigation campaign is helpful, the campaign was conducted on a terrain that repeatedly required changes in maneuvers."[5]

Brown I and *Brown* II

In 1952 the Supreme Court granted certiorari to consider a direct challenge to racial segregation in the public schools in Topeka, Kansas. Similar cases from Delaware, South Carolina, and Virginia were consolidated with *Brown* on appeal. The Court also heard argument in a fifth case, *Bolling v. Sharpe*, that dealt with public school segregation in Washington, D.C.[6] The appointment of a new chief justice, the reargument of the cases before the reconstituted Court, and intracourt negotiations to secure unanimity among the justices all delayed a decision in the cases. Finally, on May 17, 1954, the Court announced its rulings. Speaking for the Court, Chief Justice Earl Warren found that black children were psychologically injured by being forced to attend separate schools. He therefore concluded that “in the field of education the doctrine of ‘separate but equal’ has no place.”[7]

The Court in *Brown* offered somewhat incompatible explanations for its claim of psychological harm. On the one hand, it suggested that the harm to African American students came from state-enforced segregation, which communicated a message of black inferiority; thus replacing racial criteria with color-blind criteria for school attendance would remedy the injury. On the other hand, the Court said that African American students were injured by lack of contact with their white peers. From this perspective, eliminating racial criteria would not suffice; racial integration of the schools was necessary, because only integrated education could be equal education.

The Court did not resolve this ambiguity in *Brown* I, as the decision came to be called, because it postponed consideration of how to implement its ruling until its next term. The justices recognized that, given the “wide applicability” of its ruling and the “great variety of local conditions,” implementation would be no easy task. At the time of the ruling, 17 Southern and border states, plus the District of Columbia, mandated racial segregation in their elementary and secondary schools. Four other states—Arizona, Kansas, New Mexico, and Wyoming—permitted segregation by local option. More than 70 percent of African American children attended public schools in these 21 states and the District of Columbia.[8]

In *Brown* II, the Court heard more than 13 hours of oral argument, permitting all interested parties to share their views on how to dismantle the system of segregated education. Arguing for the NAACP, Thurgood Marshall pressed for an immediate start to desegregation. In contrast, counsel for the Southern states, seeking “a gradualism with infinity as the deadline,” warned of dire consequences if the Court required immediate desegregation.[9]

On its face, the Court’s decree in *Brown* II seemed to favor the NAACP. The justices reaffirmed their commitment to *Brown* I and insisted that “the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.”[10] They imposed on local school districts the responsibility for solving problems associated with the implementation of *Brown* and admitting students on a nondiscriminatory basis “with all deliberate speed.” Finally, the Court authorized federal district courts to oversee the process of desegregation and to use their equity powers to ensure compliance if local officials deviated from the mandate of *Brown*.

Yet there were problems. The Court failed to clarify whether *Brown* required racial integration of previously segregated schools or merely the assignment of children to schools on a nonracial basis. Also, the Court's ruling could be read as permitting, even condoning, delay. By exaggerating the administrative problems that would attend desegregation, *Brown* II seemed to allow Southern school districts to delay desegregation. Indeed, the absence of deadlines for starting or completing desegregation, as well as the language of "all deliberate speed," seemed to encourage proponents of segregation to create local problems to justify delay. Small wonder, then, that Southern officials were elated. A Southern attorney explained: "We couldn't ask for anything better than to have our local, native Mississippi district judges consider [the issue] … Our local judges know the local situation, and it may be 100 years before it's feasible." NAACP officials, meanwhile, considered *Brown* II "a great mistake."[11]

The Response to *Brown*, 1954–1964

Legally mandated desegregation was dismantled without much controversy or resistance in the Northern and border states. In Topeka, Kansas, where *Brown* originated, a desegregation plan was introduced in 1955 that assigned all students to their neighborhood schools. In Washington, D.C., the school board prepared a desegregation plan even before *Bolling v. Sharpe* was decided and adopted the plan eight days after the decision. By 1961, more than half the black students in the border states were attending school with whites, and this proportion increased in succeeding years.

The South was another story. In some states, efforts to implement *Brown* met with defiance. In Little Rock, Arkansas, Governor Orval Faubus deliberately provoked a violent confrontation over the desegregation of Central High School. Only after President Dwight Eisenhower dispatched federal troops to protect from hostile mobs the black students who were to attend Central—and after the Supreme Court sternly denied the school board's request to postpone desegregation—did a fragile peace return.[12] The Virginia legislature empowered the governor to seize and close any school threatened with racial integration and forbade the use of state funds for any integrated schools. Prince Edward County, Virginia, closed its public schools for four years, with white students attending "private" schools supported by tuition grants from the state. Eventually, the Supreme Court halted the charade and authorized the district court to reopen the public schools on a desegregated basis and require funding for them.[13] Meanwhile, several Southern states launched campaigns of legal harassment against the NAACP and other civil rights organizations. These efforts, along with the violence and intimidation practiced by the Ku Klux Klan and the White Citizens' Councils, put advocates of desegregation on the defensive. Despite the rigid segregation in Mississippi, for instance, no desegregation suits were filed in the state until 1961. As Richard Kluger put it, an "exorcism is seldom a pretty spectacle."[14]

Not all Southern resistance was overtly illegal. Opponents of *Brown* appealed to public opinion, seeking to inflame hostility toward the Supreme Court and desegregation. The most influential of these appeals was the congressional "Southern Manifesto," signed by more than 100 Southern senators and representatives, which denounced *Brown* as an abuse of judicial authority and pledged to overturn it "by all lawful means." School boards masked their intransigence in inaction, offering ingenious justifications for delay instead of desegregation plans. State legislatures enacted laws designed to fortify segregation and discourage desegregation. A Louisiana law, for example, denied promotion or graduation to any student of a desegregated school, and a Georgia law deprived police officers of their retirement and disability benefits if they failed to enforce the state's segregation laws. From 1954 to 1957 alone, Southern states enacted more than 130 new laws and constitutional amendments designed to preserve segregation. Commentators wryly noted that Southern school desegregation exhibited far more deliberation than speed.

Faced with obstruction by Southern political officials, civil rights groups sought relief from federal district courts. However, these courts often could not—or did not—help. Some Southern district court judges, reflecting the political milieu in which they served, sought to contain rather than enforce *Brown*. Thus, Judge Whitfield Davidson, whose rulings in a Dallas desegregation case were reversed six times, lamented that the "white man has a right to maintain his racial integrity, and it can't be done so easily in integrated schools."[15] Even judges committed to upholding *Brown* found it difficult to know what to do. The Supreme Court's mandate in *Brown* II was ambiguous, yet the Court refused to hear cases that might clarify its position. In the absence of guidance from the Court, some federal judges used their discretion to narrow the effect of *Brown*, maintaining that it merely required the use of race-neutral criteria for assigning pupils. Thus, school districts could meet their constitutional obligations even if their schools remained almost completely segregated. Other judges were "content with [desegregation at] the pace of an extraordinarily arthritic snail."[16] Judges who recognized that *Brown* required real desegregation often found themselves stymied by ingenious efforts to preserve racial separation. They would no sooner invalidate one law than the state legislature would pass another, mirroring the Southern saying, "As long as we can legislate, we can segregate."[17]

As late as 1963, fewer than 1 percent of black students in the South were attending school with white children. Even in localities where the Supreme Court had intervened directly, results were discouraging. For example, in 1963, only 69 of the 7700 students at the supposedly desegregated, "formerly" white junior and senior high schools in Little Rock were black. In the South, at least, *Brown*'s tenth anniversary offered no cause for celebration.

School Desegregation, 1964–1971

A dramatic shift occurred in attendance patterns in the South in the second decade after *Brown*. In 1964, only 1.2 percent of black students in the South attended school with whites; by 1973, 91.3 percent did. What accounts for this shift? First, after 1964, Congress and the federal executive branch joined with the Court in promoting school desegregation. Second, the Supreme Court forcefully intervened, clarifying what constituted a violation of *Brown* and what measures lower courts might impose to remedy violations.

Congress's enactment of the Civil Rights Act of 1964 "represented a gathering and coalescence of the [national] will on the whole question of Southern school segregation."[18] Title II of the act authorized the Department of Justice to sue "for the orderly achievement of desegregation in public education." This relieved the NAACP Legal Defense Fund of the burden and expense of litigating desegregation, and it effectively undercut the Southern strategy of deterring desegregation suits by attacking civil rights organizations. Title VI of the Act prohibited the dispersal of federal funds to units of government, including school districts, that practiced racial discrimination. The impact of this provision increased with the passage of the Elementary and Secondary Education Act (ESEA) in 1965. ESEA established a program of federal financial aid to school districts, and, given the poverty in many Southern states, their districts stood to benefit from the aid program. However, if a school district refused to desegregate, its federal funds could be cut off. Thus, if the Civil Rights Act proffered the stick of federal enforcement, ESEA offered the carrot of federal inducements. By 1969, federal funds made up between 11 and 21 percent of state budgets for public schools in the Southern states. Southern school districts, therefore, could ill afford to defy court orders to desegregate without jeopardizing the flow of federal dollars on which they had become dependent. One expert concluded: "The change [in the South] would have been impossible without the lure of money from the Elementary and Secondary Education Act."[19]

In 1968, the Supreme Court also clarified what compliance with *Brown* entailed. In *Green v. County School Board* (1968), it invalidated a "freedom of choice" plan, under which students could in theory choose which school they would attend, noting that pressure might be applied to discourage black students from selecting white schools.[20] More importantly, the Court rejected "freedom of choice" because it failed to produce meaningful integration. Implicit in this ruling were two assumptions: First, without state segregation laws, racial integration would have occurred. Second, the responsibility of previously segregated school systems was to achieve the level of integration that would have existed in the absence of segregation. By portraying *Brown* as requiring racial integration, the Court ensured that racial balance would thereafter be a crucial element in its decisions.

The Court's new forcefulness can also be seen in the measures it endorsed for remedying violations of *Brown*. In *Green*, the Court bluntly stated that the time for "deliberate speed" had passed, and that desegregation must be immediate. In *Swann v. Charlotte-Mecklenburg Board of Education* (1971), it specifically endorsed various remedial measures that district court judges had used to promote desegregation, such as the alteration of student attendance zones and the busing of students to achieve integration. Although the Court cautioned that busing could not "risk the health of the children or significantly impinge on the educational process," *Swann* emboldened district court judges in their aggressive efforts "to eliminate from the public schools all vestiges of state-imposed segregation."[21] The effects of the efforts of Congress and the Court were apparent almost immediately: By 1972, public schools in the South and border states were the least segregated in the country.

The Courts and School Desegregation, 1971–2023

The Changing Context of School Desegregation During the late 1960s and the 1970s, plaintiffs expanded the scope of desegregation efforts, challenging racial segregation in Northern urban districts as well as in the South. The decision to confront Northern school segregation seemed logical. With the massive emigration of African Americans from the South in the first half of the twentieth century, a large and increasing percentage of black schoolchildren lived in Northern urban areas, and many attended single-race schools.

Several factors complicated desegregation litigation in the North. Southern school districts had forthrightly maintained segregated systems, but most Northern districts never expressly mandated separate schools for blacks and whites. Because *Brown* outlawed only *intentional* school segregation, the mere fact of segregated schools did not violate the Constitution. Proving constitutional violations, therefore, was more difficult than it had been in Southern school cases. Some Northern districts did pursue blatantly segregationist policies. In Dayton, Ohio, for example, African American teachers were forbidden to teach white students. But, in most cases, Northern school officials had contrived to promote racial segregation through undramatic and, on the surface, race-neutral policy choices. In Denver, for example, the school board gerrymandered school attendance zones to maintain racially homogeneous schools and set up mobile classrooms at black schools rather than transfer the overflow of students to underutilized white schools. In Boston, the school board ensured that students from white elementary schools would attend white middle schools, and it constructed new schools in locations designed to maintain racial separation. Plaintiffs in Northern desegregation suits had to prove that actions, which on their face were racially neutral, were intended to promote segregation rather than to serve purposes consistent with the mandate of *Brown*.

Even if they could prove intentional segregation, there was a further hurdle. To a considerable extent, patterns of racial segregation in Northern schools mirrored longstanding residential segregation, which complicated efforts to prove that school segregation resulted from official discrimination rather than from private housing choices. And even if official discrimination contributed to school segregation, it was difficult to define its precise effect. Because *Brown* permitted district judges to eliminate only the effects of intentional segregation, the scope of the district court's remedy had to coincide with the scope of the constitutional violation.

Designing an effective remedy for segregation also posed a problem. Given the level of residential segregation in Northern cities, judges could not achieve substantial integration merely by assigning students to their neighborhood schools. Even busing students to other schools within a school district might not produce much integration. School districts in Northern cities rarely encompassed the entire metropolitan area. Rather, suburban school districts, whose student population was primarily white, typically ringed urban school districts, whose student population was heavily nonwhite. This configuration posed an obstacle to meaningful integration, ensuring a ready "escape" for families reluctant to send their children to predominantly nonwhite schools. If enough families exited the school district, that too could frustrate efforts to achieve desegregation.

Judicial Rulings and Popular Responses At the outset of the 1970s, the Supreme Court adopted an aggressive approach to school desegregation. In *Swann*, it upheld a federal district court's desegregation plan that ordered busing for more than 13,000 students. While denying that the Constitution required "any particular degree of racial balance and mixing," the Court endorsed reliance on the racial composition of the whole school district in determining the scope of constitutional violations. The decision rescued plaintiffs from the task of proving the effect of discriminatory policies. The Court simply assumed that, in the absence of state-imposed segregation, the proportion of black and white students in specific schools would generally coincide with their distribution in the school district as a whole.

In its first Northern desegregation case, *Keyes v. School District No. 1, Denver, Colorado* (1973), the Court upheld the federal district court's finding that the school board's various efforts to maintain racially homogeneous schools violated *Brown*.[22] The Court also eased the burden of proof on plaintiffs who sought to prove intentional segregation. If the plaintiff could prove intentional segregation in one part of the school system, the justices held, then the burden of proof shifted to the school board to show that segregation in other parts of the school system did not result from official action. Because proving this was virtually impossible, *Keyes* in effect permitted district-wide desegregation remedies, including busing, based on violations occurring in only one part of the district.

The public response to this aggressive judicial intervention was overwhelmingly negative. Congress cut off federal funds for busing in 1972; and, in 1978, it forbade terminating federal funding to school districts when compliance with desegregation would require busing. More than 200 members of Congress supported a constitutional amendment to outlaw busing for racial balance. In some Northern communities, violence erupted. In Pontiac, Michigan, arsonists firebombed 10 school buses; and at South Boston High, after a white student was stabbed, an angry mob trapped 135 black students in the school for four hours, until the police extricated them. In many cities, court-ordered busing prompted "white flight" to private schools or to the suburbs. In Memphis, Tennessee, 35 percent of white students left the public school system during the first year of busing; and in New Castle County, Delaware, white enrollment following busing declined 50 percent. Instead of promoting racial integration, busing in these communities accelerated the transition to a racially homogeneous school system.

In the face of such widespread opposition, the Supreme Court retreated. In *Milliken v. Bradley* (*Milliken* I, 1974) the Court curtailed the power of district court judges to remedy segregation.[23] The judge in *Milliken* had ordered busing between Detroit and surrounding suburban school districts to relieve segregation in the city's schools. By a 5–4 vote, the Court reversed the lower court, holding that, because the suburban districts had not participated in the segregation of the Detroit schools, they were not obliged to participate in efforts to desegregate them. By prohibiting interdistrict busing except when suburban districts had connived to segregate inner-city schools, the Court undercut efforts to integrate Northern urban school districts. In the wake of *Milliken* I, some district courts turned from reassigning students to mandating programs of educational improvements as the remedy for constitutional violations.

However, the Supreme Court indicated in *Missouri v. Jenkins* (1995) that there were limits to the fiscal burdens that judges could impose on school districts and that the remedial programs they devised had to be tied to undoing the effects of unlawful segregation.[24]

Finally, in *Pasadena Board of Education v. Spangler* (1976) and *Freeman v. Pitts* (1992), the Court suggested that the time for judicial supervision of school desegregation was ending.[25] The Court held that, once a school district had met its duty to desegregate, school authorities did not have to continue to adjust attendance zones to promote integration. Even if shifts in the district's population promoted the resegregation of schools, the mandate of *Brown* was to eliminate the effects of intentional segregation, not to guarantee integrated schools. Between 1980 and 2000, 25 large urban districts in the North and South were judged to have complied with desegregation decrees and to have remedied the effects of past discrimination and were thus released from federal judicial supervision.

The Legacy of *Brown*

In 1954, 21 states and the District of Columbia, enrolling more than 70 percent of the African American students in the United States, either required racial segregation in their schools or permitted it by local option. *Brown* succeeded in desegregating public schools in Northern and border states that had maintained dual school systems. But a decade after *Brown*, 99 percent of African American students in the South still attended segregated schools. Congressional intervention prompted the desegregation of Southern schools in the late 1960s and early 1970s, so that, by 1972, 91 percent of black students in the South were attending integrated schools.

In the late 1960s, plaintiffs began to sue to promote racial integration in education nationwide. As a result, by 1991 more than half of all public-school students were attending school in districts that had formal desegregation plans. Yet, because of changing demographics, white flight, and the Supreme Court's rejection of interdistrict busing, these efforts did not significantly reduce racial segregation. Demographic shifts effectively resegregated school districts in several urban areas, and the Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007) made it more difficult for districts to take voluntary steps to promote integration.[26] By 2009, the percentage of black schoolchildren attending majority white public schools was lower than at any time since 1968, and this trend has continued.[27] Although one hesitates to call the Court's intervention a failure, *Brown* and succeeding cases did not guarantee racial integration in public education.

ABORTION

More than the normal contingent of reporters was on hand for the final day of the Supreme Court's 1991 Term. A large crowd of demonstrators and spectators had also gathered outside the Supreme Court, anticipating—or dreading—the Court's ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[28] At issue in *Casey* was the constitutionality of a Pennsylvania law that restricted the availability of abortion by imposing various requirements on women who were seeking abortions and on the facilities providing them (see Table 10.2). Many Court watchers believed that those restrictions interfered with the right of women to terminate their pregnancies, a right that the Court had recognized 20 years earlier in *Roe v. Wade*.[29] They thus expected that *Casey* could provide the vehicle for the Court to overrule *Roe*.

TABLE 10.2 Major Supreme Court Rulings on Abortion

Case	Ruling
Roe v. Wade; Doe v. Bolton (1972)	Recognized a woman's constitutional right to terminate her pregnancy and established a trimester framework for determining the validity of state regulations of abortion
Planned Parenthood of Central Missouri v. Danforth (1976)	Struck down state requirements of spousal consent and, for minors, parental consent for abortions; invalidated various regulations of medical procedures for abortion
Harris v. McRae (1980)	Upheld the Hyde Amendment, a congressional statute banning the use of federal Medicaid funds for abortion, unless abortion was necessary to preserve the life of the mother or in cases of rape or incest
Planned Parenthood of Southeastern Pennsylvania v. Casey (1992)	Reaffirmed the abortion right announced in *Roe*; upheld requirements that certain information be provided to women 24 hours before an abortion, that minors obtain parental consent for an abortion (with the possibility of judicial approval as an alternative), and that medical facilities performing abortions file medical information with the state; struck down a spousal notification requirement
Stenberg v. Carhart (2000)	Struck down a state law banning "partial birth" abortion unless necessary to save the life of the mother
Gonzales v. Carhart (2007)	Upheld a federal law banning "partial birth" abortion very similar to the one struck down in *Stenberg*
Dobbs v. Jackson Women's Health Organization (2022)	Overruled *Roe v. Wade* and held that the U.S. Constitution does not confer a right to abortion

The Court's decision in *Casey*, however, defied expectations, satisfying neither pro-life nor pro-choice groups. On the one hand, the Court circumscribed the constitutional right announced in *Roe*, with five justices upholding all provisions of the Pennsylvania law except the requirement that a woman notify her spouse before obtaining an abortion. On the other hand, a different coalition of five justices expressly reaffirmed *Roe* and the right to abortion recognized in that case. What was clear was that the justices were bitterly divided on the abortion issue. Four justices—Rehnquist, Scalia, Thomas, and White—insisted that the Pennsylvania statute was constitutional and that *Roe* should be overruled. Two justices—Blackmun and Stevens—maintained that *Roe* should be affirmed and the Pennsylvania law struck down in its entirety. The three remaining justices—O'Connor, Kennedy, and Souter—upheld most provisions of the Pennsylvania law but refused, largely on the basis of *stare decisis*, to repudiate *Roe*. Instead, they affirmed that the Constitution forbade government from imposing an "undue burden" on a woman's choice of whether to have an abortion. Although Justice Scalia and Chief Justice Rehnquist attacked the three justices' interpretation of history and *stare decisis* in scathing terms, *Casey* confirmed that the "essential holding" of *Roe* remained part of American law.

Fast forward to 30 years later, when crowds again gathered outside the Supreme Court anticipating—or fearing—a landmark abortion ruling. At issue in *Dobbs v. Jackson Women's Health Organization* (2022) was a Mississippi law banning abortion, with few exceptions, after 15 weeks of pregnancy.[30] But both pro-life and pro-choice advocates recognized that much more was at stake. As lower courts had recognized, the challenged Mississippi law was inconsistent with *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, so in *Dobbs* the question was whether the Court would overrule those precedents.

By a 6–3 vote, the Court upheld the Mississippi law, and five justices—all of them appointed by Republican presidents—joined the Opinion of the Court overruling *Roe* and *Casey*. Speaking for the Court, Justice Samuel Alito discounted the precedential force of those cases, insisting that "proper application of *stare decisis* required an assessment of the strength of the grounds on which *Roe* was decided." No right to an abortion, he noted, was found in the language of the Constitution, nor was such a right deeply rooted in the nation's history and tradition. Indeed, most states outlawed abortion at the time the Fourteenth Amendment was adopted. Put simply, "*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences." Indeed, "*Roe* was on a collision course with the Constitution from the day it was decided." So the appropriate course was to overrule *Roe* and return the regulation of abortion to the people and their elected representatives.

Justices Breyer, Kagan, and Sotomayor—all justices appointed by Democratic presidents—joined in an unusually harsh dissent, claiming the majority was discarding a well-established precedent "without showing that anything significant has changed to justify its radical reshaping of the law." They accused the majority of being guided by political rather than legal considerations, arguing that "the Court reverses course today for one reason and one reason only: because the composition of this Court has changed." But in pursuing such a course, they concluded, the majority risked damaging the legitimacy and credibility of the Court.

But before examining the effects of *Dobbs*, let us examine how abortion became a legal issue and how the Supreme Court has dealt with it.

Abortion Becomes a Legal Issue

Like most important policy issues that make their way to the Supreme Court, abortion did not emerge as a constitutional issue by happenstance or through the dogged efforts of a single person. Although there was never a fully orchestrated plan to test the constitutionality of restrictions on abortion, a loose network of groups committed to liberalizing state abortion laws had formed by the 1960s. Thus *Roe v. Wade*, like *Brown v. Board of Education*, is best understood as the culmination of a campaign to promote legal change.[31]

In the early 1960s, the laws in most states permitted abortion only in limited circumstances, such as to save the life of the mother. These laws, most of which dated from the late nineteenth century, effectively restricted legal abortions—only 8000 were performed nationwide in 1966. However, they did not eliminate abortions: that same year an estimated one million illegal abortions were performed.[32]

Beginning in the 1950s, support for state restrictions on abortion began to erode. Physicians at medical conferences claimed that the restrictions infringed on their medical judgment. Of even greater significance was the publication in 1962 of a model penal law by the American Law Institute (ALI) that permitted abortion when pregnancy was the result of rape or incest, when its continuation threatened the physical or mental health of the mother, or when there was a risk of birth defects. During the early 1960s, reports about the fertility drug Thalidomide and an outbreak of German measles, both of which caused severe birth defects, brought the issue of abortion before the general public. When the California State Board of Medical Examiners brought disciplinary charges against prominent physicians who had performed abortions on women with German measles, the state's medical profession rallied behind the doctors and urged the California legislature to liberalize the state's abortion law.

As abortion became a more salient issue, and as opinion on abortion shifted, groups such as the National Association for the Repeal of Abortion Laws (NARAL) campaigned for more permissive abortion policies. In the seven years before *Roe*, from 1966 to 1972, these groups enjoyed considerable success. Fourteen states enacted more liberal abortion laws modeled on the ALI guidelines; and four states—Alaska, Hawaii, New York, and Washington— repealed their laws restricting abortion. Yet because the laws in 46 states continued to regulate abortion, many illegal abortions were performed even in those states that had modified their laws. Pro-choice advocates concluded that even the ALI-style laws did not ensure adequate access to abortion.

While pursuing legislative reform, abortion reformers also contemplated taking the issue to the courts. The Supreme Court's ruling in *Brown v. Board of Education* convinced them that judicial rulings could inaugurate far-reaching social changes. In addition, judicial resolution of the abortion issue had advantages. Whereas legislative reform required a state-by-state effort, a single Supreme Court ruling could establish policy nationwide. Moreover, should the Court recognize a constitutional right to choose whether to terminate a pregnancy, it would require a constitutional amendment or a shift on the Court to overturn that ruling. Finally, a judicial ruling would provide a firmer foundation for legalized abortion, establishing it as a woman's right rather than merely a matter of physicians' interests or health concerns.

But if the potential rewards of litigation were great, so too were the risks. Because a pregnant woman challenging a state abortion law would no longer be pregnant by the time her case reached the Supreme Court, the Court might avoid the issue on technical grounds, much as it had refused to hear an early challenge to Connecticut's ban on the sale and use of contraceptives.[33] Even worse (from the pro-choice perspective), the Court might uphold state abortion laws, dealing the reformers a major setback. Advocates of abortion reform, therefore, faced two problems: First, they had to find an appropriate plaintiff to challenge a state abortion law. (As Box 10.1 shows, the discovery of "Jane Roe" occurred largely by chance.) Second, they had to develop persuasive arguments for the unconstitutionality of state abortion laws. This was complicated because the Constitution does not expressly address the right to terminate a pregnancy and, for more than a century, the states had laws on the books restricting abortion. Abortion reformers therefore undertook efforts to influence legal thinking on the issue. For example, they funded research for an article by law professor Cyril Means on the history of the abortion right, an investment that paid huge dividends when the Supreme Court cited the article seven times in support of its ruling in *Roe*.[34] When the

Box 10.1 Who was Jane Roe?

When *Roe v. Wade* was argued before the U.S. Supreme Court, the plaintiff's attorneys used the pseudonym "Jane Roe" to protect her from the social stigma of acknowledging that she was pregnant but unmarried. But eight years after the ruling, Norma McCorvey disclosed that she was "Jane Roe." At the time the case was initiated, McCorvey was 21. Married at 16, divorced, and the mother of a five-year-old daughter, McCorvey felt that she could not care for another child. She claimed—falsely, she later admitted—that her pregnancy was the result of rape, hoping that would enable her to get an abortion. But Texas's law outlawed abortions except to save the life of the mother, and McCorvey could not find a physician willing to perform an illegal abortion. She resigned herself to having the baby and giving it up for adoption. When she spoke to a lawyer about this, he referred her to Linda Coffee and Sarah Weddington, two young lawyers who were eager to challenge the Texas abortion law. After discussing the matter with them, McCorvey agreed to serve as plaintiff in the case.

How did *Roe v. Wade* affect Norma McCorvey? It did not enable her to get an abortion. Her child was born and given up for adoption before the Supreme Court ever heard her case. Although she was, at the time, ecstatic about the Court's ruling ("It makes me feel like I'm on top of Mount Everest"), she played little role in the litigation and did not even attend the oral argument before the Supreme Court. Indeed, when told that her case was being appealed to the Court, she reacted: "My God, all those people are so important. They don't have time to listen to some little old Texas girl who got in trouble."

McCorvey's disclosure that she was "Jane Roe" thrust her into the spotlight, and she became involved politically, speaking at pro-choice rallies and working as marketing director at an abortion clinic in Dallas. Then, in 1995, she had a change of heart. She quit her job at the clinic and was baptized by Reverend Flip Benham, national director of the anti-abortion group Operation Rescue. In a radio interview after the conversion, she declared, "I'm pro-life. I think I have always been pro-life, I just didn't know it." In 1998, she joined the Catholic Church and briefly became involved in pro-life activities but, over time, she moved away from the anti-abortion movement and from personal involvement with the issue more generally.

As Norma McCorvey's story illustrates, the people whose cases reach the Supreme Court may be quite ordinary people. But the litigation is not ordinary litigation. Except in criminal cases, the litigants may have "disappeared" by the time the Court hears their cases. This is hardly surprising, for the Supreme Court does not review cases to correct injustices to particular individuals but to decide legal issues of national importance. Thus, what is at stake is not so much the fate of the litigants—indeed, in McCorvey's case, the ruling in *Roe* had no immediate effect on her situation—but the legal principles that will govern the nation.

SOURCES: Marian Faux, *Roe v. Wade* (New York: Macmillan, 1988); Norma McCorvey with Andy Meisler, *I Am Roe: My Life, Roe v. Wade, and Freedom of Choice* (New York: Harper Collins, 1994); and Joshua Prager, *The Family Roe* (New York: W. W. Norton & Co., 2021).

Supreme Court agreed to hear constitutional challenges to the abortion laws in Texas and Georgia, groups within the abortion rights movement worked together to write the legal briefs and prepare the attorneys for oral argument.

Roe v. Wade

In *Roe v. Wade*, the Supreme Court invalidated Texas's traditional abortion statute; and in the companion case of *Doe v. Bolton*, it struck down Georgia's ALI-style abortion law.[35] Speaking for a seven-member majority, Justice Harry Blackmun concluded that the right to privacy, initially recognized in *Griswold v. Connecticut* eight years earlier, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[36] This right, the Court cautioned, was not absolute. During the first trimester (12 weeks) of pregnancy, a woman—in conjunction with her physician—could decide whether to terminate her pregnancy without state interference. During the second trimester, states could regulate the abortion procedure, but only to safeguard maternal health. During the third trimester, which coincided with the viability of the fetus—its ability to survive outside the womb—states could regulate or even ban abortion except when necessary to preserve the life or health of the mother.

Roe and *Doe* had national implications. Thirty-one states had abortion laws like Texas's, 13 had reformed laws like Georgia's, and two banned all abortions. Presumably, the Court's rulings required all those states to abandon their abortion laws. Only the four states that had repealed their abortion laws were unaffected. The Opinion of the Court also enunciated unusually detailed guidelines governing how states could regulate abortion in the future. The clarity of the Court's guidelines stood in sharp contrast to the vague "all deliberate speed" formula in *Brown v. Board of Education*. After *Roe*, states for the most part knew what sorts of regulations of abortion would survive judicial scrutiny. The very detail of the guidelines, however, particularly in the absence of clear support in the text of the Constitution, opened the Court to criticism that it was legislating rather than judging.

From *Roe* to *Dobbs*

The general public's immediate response to *Roe* was rather muted; former President Lyndon Johnson died on the same day *Roe* was decided, and his death, not the Court's decision, captured the day's headlines. The groups most interested in the case reacted as expected. Lawrence Lader, chairman of the NARAL, hailed the Court's ruling as "a thunderbolt" and "even more conclusive than any of us had dared to hope." John

TABLE 10.3 Legal Abortions in the United States

Year	Total Abortions (in Thousands)	Abortions per 1000 Live Births
2020	620,000	198
2010	766,000	225
2000	857,000	248
1990	1,429,000	344
1980	1,298,000	359
1973	616,000	196

SOURCE: Center for Disease Control, at www.cdc.gov/mmwr/reproductivehealth/datastats

Cardinal Krol, president of the National Catholic Conference, charged the Court with opening the door to "the greatest slaughter of innocent life in the history of mankind."[37]

Nevertheless, *Roe* had immediate effects: in the year it was decided, legal abortions rose from 587,600 to 745,400, an increase of 27 percent.[38] In the years following, legal abortions in the United States rose to more than 1.3 million in 1992, before declining to 630,000 in 2020. *Roe* also invigorated a continuing controversy about abortion (see Table 10.3).

The Pro-Life Response When a supporter went to NARAL's headquarters in New York after *Roe* was decided, she found it shut tight with a sign posted that they had won and that everyone had gone home.[39] This typified the immediate response of pro-choice groups, who assumed that *Roe* had won the battle and that the courts would repel any efforts to restrict a woman's right to terminate her pregnancy. But for pro-life advocates, the battle had just begun. *Roe* galvanized pro-life forces, sparking a grassroots movement committed to overturning the Court's ruling and opposing the spread of abortion.[40] The pro-life forces sought to influence public opinion through picketing, demonstrations, and pray-ins—tactics learned from the civil rights movement. More radical pro-life groups, such as Operation Rescue, attempted to prevent abortions, descending *en masse* on abortion clinics and forcibly blocking access to the facilities. Most important, however, pro-life groups pressured public officials to oppose and limit abortion. If they had lost in the judicial arena, they sought in other arenas to reverse or limit the Court's ruling.

The most direct way to overturn a Supreme Court ruling is by constitutional amendment. Pro-life forces, however, could not persuade Congress to support an anti-abortion amendment. Although 275 anti-abortion amendments were proposed in Congress from 1973 to 1985, only one received committee approval and reached the floor of the House, where it failed to win a simple majority vote. Senator Jesse Helms of North Carolina introduced a Human Life Bill that would have defined human life as beginning at conception, but it too found little support. The primary success pro-life forces enjoyed in Congress was the enactment of the Hyde Amendment, which barred the use of Medicaid funds for abortions except to save the life of the mother. When this law was challenged, the Supreme Court backed away from a confrontation with Congress, upholding the Hyde Amendment by a 5–4 vote.[41]

Pro-life forces enjoyed considerable success with the executive branch when Republicans held the presidency. Republican presidents from Ronald Reagan to Donald Trump initiated administrative actions designed to discourage abortion, such as banning the use of foreign aid money to support abortions, prohibiting the use of fetal tissue in medical research, and banning abortion counseling or referrals at federally funded clinics. Although this last directive—labeled the "gag rule" by critics—was challenged in the courts, the Supreme Court in *Rust v. Sullivan* (1991) sustained the ban by a 5–4 vote.[42]

However, when Democratic presidents took office, they quickly reversed the administrative initiatives of their Republican predecessors. President Bill Clinton, for example, rescinded the gag rule at federally funded clinics, lifted the anti-abortion restrictions on foreign aid, and also vetoed a bill outlawing what its proponents described as "partial birth abortions." Yet these changes lasted only until the next Republican president was sworn in. President George W. Bush supported and signed congressional legislation outlawing partial birth abortion, subsequently upheld by the Supreme Court in *Gonzalez v. Carhart* (2007), and also reinstituted the gag rule and the foreign aid restrictions.[43] The alternation between Republican and Democratic approaches on abortion policy continued through the administrations of Presidents Obama, Trump, and Biden.

Even more important were the judicial appointments made by Republican and Democratic presidents. Republican presidents sought to undermine *Roe v. Wade* by appointing judges opposed to *Roe*, while Democratic presidents pledged to protect it by appointing judges committed to abortion rights. Yet Republican presidents had far more impact on the composition of the Supreme Court. From 1973 when *Roe* was decided, to 2023, Republicans held the presidency for 27 years and Democrats for 23. Yet during that period, as a result of the death or strategic retirement of justices as well as political maneuvering (see Chapter 3), Republican presidents appointed 11 justices and Democratic presidents only five. Changes in the composition of the Court encouraged pro-life advocates to bring challenges to *Roe*, and their efforts were rewarded. When the Supreme Court decided *Dobbs*, all six justices in the majority had been appointed by Republican presidents.

The reaction of state legislatures to *Roe* varied. While some states sought to bring their laws in line with *Roe*, others initially attempted to impede access to abortion. A few states blatantly defied the Court's ruling. North Dakota and Rhode Island, for example, enacted laws banning abortion except to save the life of the mother. Other states, while not challenging *Roe* directly, adopted legislation that sought to exploit "loopholes" in the decision. Early laws discouraged abortion by requiring spousal and parental consent, mandatory waiting periods, hospitalization, and elaborate statistical reporting. More recent laws included requirements that pregnant women view ultrasound images of their fetus and that fetal remains after abortion be buried or cremated. These laws served several purposes. They increased the expense or difficulty of obtaining an abortion, they drained the time and resources of the pro-choice groups that challenged the laws and of the courts that heard those challenges, and they provided opportunities for opponents of abortion to urge the Supreme Court to reconsider its ruling in *Roe*.

Abortion Rulings from Roe to Dobbs In contrast with school desegregation, where the Supreme Court virtually withdrew for a decade after announcing its ruling in *Brown*, the Court remained actively involved with abortion policy. In the first two decades after *Roe*, the justices decided 21 abortion cases. From 1973 to 1986, the Court consistently reaffirmed its basic holding and closely policed state efforts to curtail the right recognized in *Roe*. Thus, it invalidated requirements for spousal and parental consent, counseling, hospitalization, and various regulations of abortion procedures. Only governmental refusals to fund abortions and a requirement that parents be notified before a minor could receive an abortion survived the Court's scrutiny.[44]

From 1986 to 1992, four members of the *Roe* majority retired, and Presidents Reagan and Bush replaced them with justices they believed would be unsympathetic to *Roe*. As the Court's composition changed, so did its rulings (see Table 10.2). In *Webster v. Reproductive Health Services* (1989) and *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), the justices discarded the trimester framework announced in *Roe*, though they refused to overrule that decision. *Roe* won a temporary reprieve with President Clinton's appointment of Justices Ruth Bader Ginsburg and Stephen Breyer to the Court. These justices supplied the crucial votes in *Stenberg v. Carhart* (2000), in which the Court, by a 5–4 vote, struck down a state law banning "partial birth" abortions unless necessary to save the life of the mother. However, in *Gonzales v. Carhart* (2007), a 5–4 majority on the Court upheld a federal law outlawing the same procedure. The different result reflected not so much differences in the two laws as differences on the Court. Chief Justice John Roberts and

Justice Samuel Alito, both appointed by President George W. Bush, voted to uphold the congressional statute. Further appointments by Republican presidents set the stage for *Dobbs*.

The Effects of *Roe* and *Dobbs*

Though they agreed on little else, both pro-life and pro-choice groups believed that *Roe v. Wade* inaugurated an abortion revolution. According to Justice Blackmun, who wrote the Court's opinion in *Roe*, the aim was to secure "the fundamental constitutional right of women to decide whether to terminate a pregnancy." Yet, given the questions raised about judicial policymaking capacity, did *Roe* in fact ensure that women could secure legal abortions?

First, as noted, the trend toward the availability of legal abortions began before *Roe*, following the enactment of reform statutes in some states and the repeal of abortion laws in others. Second, although *Roe* did not initiate the trend toward legal access to abortion services, it did continue the trend. The rate of increase in legal abortions actually declined slightly after *Roe*. Still, there is no way to know whether legal abortions would have increased as much without the Court's ruling. Third, the level of legal abortions in the United States plateaued and then declined in recent years. Whether the decline is the result of the efforts of abortion opponents, through the Hyde Amendment and various state laws to decrease access to abortion, or the effect of greater access to contraception, or an indication of changes in social mores is difficult to tell. But the decline does not appear to be the unavailability of abortion services. A study by the Centers for Disease Control found that approximately 94 percent of women who would have been eligible for Medicaid funding before the Hyde Amendment were able to obtain some kind of funding for their abortions.[45] Similarly, bans on abortions in public hospitals or by public employees did not reduce the number of abortions. Private clinics, responding to market demand, filled the gap.[46]

But if the Court's aim in *Roe* and *Casey* was to settle the issue of abortion, it did not succeed. Before *Roe*, changes in state abortion laws were occurring with a minimum of fanfare and limited political conflict, but *Roe* changed that. The decision became a rallying point for both pro-choice and pro-life forces. It increased the visibility of abortion, nationalized the issue, and intensified the conflict over it. Even prior to *Dobbs*, both pro-life and pro-choice groups recognized that *Roe* might someday be overruled and took steps to prepare for that eventuality. For pro-life forces this preparation took the form of "trigger bans," that is, laws restricting or banning abortion that would take effect if the Supreme Court overturned *Roe*. In 2019, for example, six states enacted "heartbeat" bills that banned abortion from the moment (at six weeks' gestation) when a fetal heartbeat was generally detectable. These laws not only served to protect fetal life but also, by clearly violating *Roe*, provided an opportunity for the Court to reconsider its ruling in that case. For pro-choice forces this pre-*Dobbs* preparation took the form of enshrining abortion rights in state law, either by statute or through state court decisions recognizing a state constitutional right to abortion. (We shall discuss state constitutional protections for rights in detail in Chapter 11.) By 2023, ten states had adopted legal protections for abortion rights that were unaffected by the Supreme Court's ruling in *Dobbs*. In 2022, however, the Iowa Supreme Court, following a turnover in membership, reversed an earlier ruling and concluded that the Iowa Constitution did not protect a right to abortion; and the Florida legislature challenged the Florida Supreme Court's recognition of a state constitutional right to abortion by enacting restrictions on abortion post-*Dobbs*.[47]

In the aftermath of *Dobbs*, the efforts of both pro-life and pro-choice groups intensified. Pro-choice groups immediately petitioned Congress to create a statutory right to abortion; but although the House of Representatives passed a bill safeguarding abortion rights in 2022, the Senate declined to address the issue. Much more activity occurred at the state level. State trigger laws went into effect, and several states enacted new laws banning or restricting abortion. Pro-choice groups challenged many of these restrictions in court, but with mixed results. In 2023, for example, the South Carolina Supreme Court struck down the state's "heartbeat" ban on abortion as in violation of the state constitution's protection of a right to privacy, whereas the Idaho Supreme Court upheld several restrictions on abortion, concluding that the state constitution did not protect a fundamental right to abortion.[48] Pro-choice groups fared better when abortion was on the ballot. In 2022 voters in California, Michigan, and Vermont approved state constitutional amendments recognizing a right to abortion, while voters in Kansas and Kentucky rejected amendments denying that their constitutions protected a right to abortion.[49]

BROWN, ROE, DOBBS, AND BEYOND

The federal courts' policymaking on school desegregation and abortion illustrates how political issues come before the federal courts for resolution, how judicial policies change over time, how those persons affected by judicial policies may respond to them, and why judicial policies achieve or fail to achieve their objectives.

The Development of Legal Issues

Brown, *Roe*, and *Dobbs* all resulted from campaigns to change public policy through the courts. These campaigns resembled each other in some respects. Although the reform groups sought to dictate the focus and timing of litigation, they also had to respond to unexpected opportunities, such as the discovery of a suitable plaintiff in *Roe*, and to fortuitous developments, such as the accumulation of favorable precedents in the graduate-school cases litigated before *Brown*. The three campaigns, however, also reveal the different uses that groups seeking legal reform may make of litigation. Realizing that Southern school districts would not voluntarily desegregate their schools, the NAACP relied exclusively on litigation to achieve this goal. In contrast, abortion reformers used litigation not as an alternative to political action but as an additional weapon in their effort to liberalize abortion laws. In fact, abortion reformers enjoyed considerable success in the legislative arena before challenging restrictions on abortion in the courts. Similarly, pro-life groups sought to limit abortion through political action, including the election of sympathetic presidents, emphasizing litigation only after the reconstituted Supreme Court gave them hope that it would overturn *Roe*.

Most constitutional policymaking by the federal courts involves group sponsorship of litigation, as in *Brown*, *Roe*, and *Dobbs*. Groups may also pursue their political or ideological aims in cases involving statutory interpretation or the oversight of administrative activity. They may seek to use the courts to build on victories won in the political arena or to reverse the losses they suffered there. The phenomenon of group sponsorship is hardly surprising, given the costs of litigation and the lack of financial incentives for individual plaintiffs. The main exception to group sponsorship involves defendants in criminal cases who claim that their rights were violated, as they have a strong personal stake in the outcome of their cases.

Policy Change

The Supreme Court's rulings on school desegregation and abortion show how judicial policies may change over time. Sometimes the changes are dramatic, occurring through landmark rulings such as *Brown* and *Dobbs*, that overrule previous decisions and announce a fundamental shift in direction. More often, however, changes in judicial policies are gradual or incremental. A court may explicitly modify its position in light of changing circumstances, as the Supreme Court did in dispensing with "all deliberate speed" and demanding immediate desegregation in the late 1960s after gaining the support of Congress and the presidency in its desegregation efforts. A court may also expand a legal principle by applying it to a new situation, as the Supreme Court did in *Roe v. Wade*, extending the right to privacy to encompass the right to terminate a pregnancy. In addition, a court may signal a change in policy by narrowing a legal principle announced in previous cases or by refusing to apply it to new situations. The Supreme Court's rejection of interdistrict busing in *Milliken v. Bradley* is a prime example. Finally, a court may subtly modify policy by undermining precedents even as it claims to be adhering to them. The Supreme Court's refusals to overrule *Roe v. Wade* while upholding regulations inconsistent with it in the decades preceding *Dobbs* are a case in point.

What causes changes in judicial policy? Some changes result from changes in judicial personnel. When judges are replaced by others with different legal and political views, the judicial decisions will reflect those differences. However, personnel changes on the courts, unlike those in other branches, rarely produce dramatic shifts in policy. As Chapter 8 indicated, the authority of precedent, judicial role conceptions, and other legal constraints may all limit the speed and scope of policy change. The Supreme Court's unwillingness in *Casey* to overrule *Roe v. Wade* out of respect for *stare decisis* is an example, whereas its willingness to jettison *Roe* in *Dobbs* is an exception, and the harsh reaction that ruling elicited both on and off the Court testified to its exceptional character.

Policy changes may also result from judicial dissatisfaction with the results of previous judicial policies. For instance, in *Green v. County School Board of New Kent County*, the Court had 13 years' experience with Southern efforts to delay compliance with *Brown* or evade it through programs that produced minimal desegregation. The prolonged failure to comply convinced the justices to set more specific standards for the implementation of *Brown*'s mandates, requiring immediate elimination of dual school systems and asserting that districts' plans were to be judged by the level of integration they produced.

In formulating new judicial policies, judges may rely on counsel for the contending parties or on *amicus curiae* briefs for guidance. Thus, both Thurgood Marshall for the NAACP and the attorneys for the Southern states influenced the desegregation guidelines established in *Brown* II. Judges may also borrow from the experience of other courts that have addressed similar problems in the past. The Supreme Court drew on the rulings of appeals courts in clarifying the meaning of desegregation and the experience of district courts in determining measures that might be taken to implement *Brown*.

Finally, judicial policies may also be shaped to some extent by the political environment in which judges operate. Some commentators have suggested, for example, that the Supreme Court's rulings in *Brown* and *Roe* followed, rather than led, shifts in public opinion. The Supreme Court's willingness to accord the South a period of adjustment through the mechanism of "all deliberate speed" also suggests a sensitivity to political environment, as does *Milliken v. Bradley*, in which the Court curtailed aggressive district court intervention in the face of widespread public opposition. When a judicial policy conflicts with broad public opinion, as became evident in the aftermath of *Dobbs*, it can generate an immediate political response.

Legal Obligation

A judicial ruling imposes legal obligations on the parties to the case and on lower court judges, who must apply the legal principles enunciated by the court in future cases. Judicial rulings also have legal implications for a broader "target population" that is in the same situation as the parties to the case. The size of this target population depends on the breadth of the legal principles a court announces, which in turn depends to a considerable extent on the breadth of the enactment the court is interpreting. Constitutional provisions, for example, tend to be more broadly applicable than statutes or administrative regulations. To some extent, however, courts themselves may determine the legal implications of their rulings by choosing the legal principles on which they will base their decisions. For example, before *Brown*, the Supreme Court tied its rulings in school cases to the particular facts of the cases, so that they primarily affected the parties in the cases. In *Brown*, however, the Court held that state-mandated segregation in education was unconstitutional, thus expanding the target population to include all states and localities that operated segregated school systems.

What legal obligations are imposed on a target population by a judicial ruling? Unfortunately, there is no consensus. Some legal scholars insist that a judicial ruling announces legal standards that are authoritative throughout the jurisdiction served by the court. Thus, a district court's ruling invalidating a practice requires all those within the district to refrain from the practice; a Supreme Court ruling has the same effect nationwide. Other legal scholars maintain that what is authoritative is the court's ruling in the case, not the legal principles on which it was based. Thus, one may dispute those legal principles and engage in practices which, if legally challenged, would furnish the court with an opportunity to reconsider the principles it had announced. Arguably, this is what occurred in several states before the Supreme Court's ruling in *Dobbs*. Other legal scholars distinguish between settled and unsettled law, arguing that one may engage in actions inconsistent with the legal principles announced in a case only until those principles have become firmly established. Under this standard, any racial discrimination in education would violate a legal principle established in *Brown* and confirmed in succeeding cases.

In most cases, those who are affected by judicial rulings comply with them. Yet *Brown* and *Roe* reveal that the mere existence of legal obligations does not guarantee compliance, and even those who do comply may make efforts to change the law.

Communication Problems Lower court judges or members of the target population may not comply with judicial mandates if they are unclear about what actions are required. For example, after *Brown* II, many district court judges were unsure about whether school districts had to integrate their schools or merely cease using racial criteria in student assignment. They also were unclear about the remedial measures they could employ if districts failed to meet their obligations under *Brown*. The Court's lack of clarity in *Brown*, along with its refusal to hear subsequent school cases and resolve ambiguities, increased the discretion of district court judges and officials dealing with school desegregation. Many used the opportunity to confine the effects of *Brown*.

In contrast, clear mandates, such as those enunciated in the Supreme Court's early abortion rulings, reduce discretion and encourage actions in line with the Court's aims. In *Roe v. Wade*, the Court announced detailed legal standards and, during the next decade, it further elaborated their implications in reviewing post-*Roe* legislation. Similarly, in *Swann v. Charlotte-Mecklenburg Board of Education*, the Supreme Court clarified what compliance with *Brown* required and specifically endorsed various remedial measures employed by district courts to implement *Brown*. Nevertheless, the effects of a clear initial mandate can be undermined by subsequent rulings that are inconsistent with it or that suggest a change in policy direction. The Supreme Court's rulings leading up to *Dobbs*, together with expectations created by personnel changes on the Court, illustrate this phenomenon.

Finally, a target population cannot comply with a ruling unless that ruling is transmitted to it. Beyond officially promulgating their decisions, courts have no control over the transmission of their mandates. Usually this poses no problem; those who are affected by a judicial ruling are aware of the court's action. But this is not always the case, particularly when the target population is large. For example, when the Supreme Court announces a ruling affecting the power of police officers to conduct searches or interrogations, not all officers may hear of the ruling. Similarly, many taxpayers may be unaware of Tax Court rulings that affect their tax liability.

Even if members of the target population are aware of a judicial ruling, they may misunderstand it. For example, some school officials erroneously interpreted the Supreme Court's invalidation of prayer in the public schools as merely forbidding coercion of students who did not wish to pray.[50] Such misinterpretations may occur because of ambiguities in the judicial ruling. Even if a ruling is clear, it may be simplified or distorted in the course of transmission. Most police officers, for example, get their information about rulings on police practices from nonjudicial sources, such as local officials, police training sessions, and the mass media. They can comply with the rulings only if those sources faithfully and accurately convey what the court has said.

Noncompliance Usually, people conform to the legal requirements announced in judicial decisions. Indeed, the effectiveness of judicial policy prescriptions largely depends on voluntary compliance. At times, however, the parties to a case, lower court judges, or members of the target population may refuse to undertake or refrain from actions as required by judicial rulings. Several state legislatures, for example, either ignored *Roe v. Wade* or enacted laws clearly inconsistent with its mandates. Most Southern school districts did not desegregate their schools in the decade after *Brown* II, and some district court judges abetted their noncompliance by refusing to enforce *Brown*. Even those district court judges who sought to implement *Brown* often found themselves outmaneuvered. Only the intervention of Congress, which enacted the 1964 Civil Rights Act and the Elementary and Secondary Education Act, and the executive branch, which enforced those laws, produced compliance in the South.

The federal judiciary's difficulties in implementing *Brown* underscore its limited power to compel compliance, particularly when opposition is widespread. As Alexander Hamilton noted in *The Federalist Papers*, the judiciary does not control "either the sword or the purse" and must "ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[51] When the executive and legislative branches support the federal judiciary, compliance with judicial mandates is likely. Thus, when the powers of the sword and of the purse were brought to bear on Southern school districts after 1964, noncompliance rapidly ended. But when the other branches of the national government maintain neutrality or oppose judicial policies, the federal courts' ability to ensure compliance declines dramatically.

Policy Effectiveness

All judicial policymaking faces the question: Did the court achieve its objective? The answer may not always be clear. For one thing, it may be difficult to determine the court's objective. If the aim in *Brown v. Board of Education* and succeeding cases was to eliminate official support for racial segregation, then the Court clearly succeeded; overt discrimination in education largely disappeared. If the Court's aim, however, was to ensure that children attended integrated schools, then the Court did not completely succeed. Today, most urban school districts—in the

North and South—are racially homogeneous. In addition, some districts in which racial integration existed have, with population shifts, moved toward resegregation. If the Court's objective in *Brown* was to guarantee a good education to all students without regard to race, then again the Court has had only limited success. Indeed, as Chapter 11 will show, reformers interested in improving education for the disadvantaged have in recent years focused their attention more on school finance than on desegregation.

Disentangling whether judicial decisions or other factors produced particular effects may also be difficult. Take, for example, the phenomenon of "white flight"—that is, the movement of white families and their school-aged children from urban to suburban school districts. Opponents of court-ordered busing charged that it produced white flight and that judicial policies aimed at promoting integration were counterproductive, leading instead to racial isolation for minority students in urban school districts. Other commentators, however, denied that court-ordered busing precipitated the white exodus from the cities and urban school districts. The population shift, they maintained, was a national phenomenon not limited to municipalities with court-ordered busing, and busing itself did not accelerate the process.[52]

Similarly, when the goals of judicial policy are achieved, one cannot always assume that judicial decisions produced the effects. The late 1960s, for example, witnessed a rapid and sweeping desegregation of Southern schools, as required by *Brown*. But congressional legislation and executive enforcement had more to do with the change than *Brown* did.

Even when judicial decisions achieve their objectives, other factors that neither the judges nor those who brought suit anticipated may play a key role. In *Roe v. Wade*, for instance, the Supreme Court attempted to make the option of abortion more widely available. Increases in legal abortions after 1973 indicate that the Court succeeded, but not in the way abortion reformers—and probably the justices—had expected. The reformers had assumed that hospitals would perform abortions once they were legal. Most public and private hospitals, however, continued to refuse to perform abortions even after 1973.[53] This created the possibility that the Court would be stymied by the opposition of institutions it had depended on to implement its policy, just as it had been in *Brown*.

Hospitals, it turned out, were not crucial to the success of *Roe*. When they refused to perform abortions, medical clinics were opened to meet the demand. These alternative institutions developed because of the financial incentive for providing abortions. Ironically, neither abortion reformers nor the justices foresaw how critical clinics would be. Indeed, the issue of where abortions were to be performed was ignored in the briefs submitted by the parties in *Roe* and was addressed only briefly in Justice Blackmun's opinion for the Court. In that sense, the success of *Roe* was as much the result of chance as of planning. Ultimately, the effectiveness of judicial policies may depend on the adequacy of the judges' understanding of the social processes that they are trying to influence. As discussed in Chapter 9, critics of judicial policymaking assert that judges lack the expertise, and cannot acquire the knowledge necessary, for effective policymaking. This survey of the Supreme Court's school desegregation and abortion cases should aid in evaluating these claims.

NOTES

1 *Brown v. Board of Education*, 347 U.S. 483 (1954), commonly referred to as *Brown* I.

2 *Scott v. Sandford*, 60 U.S. (19 Howard) 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

3 The discussion of the school desegregation litigation before *Brown* relies on Richard Kluger, *Simple Justice* (New York: Knopf, 1975), and Mark V. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925–1950* (Chapel Hill: University of North Carolina Press, 1987).

4 Important victories included *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sweatt v. Painter*, 339 U.S. 629 (1950); and *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950).

5 Tushnet, *NAACP's Legal Strategy*, p. 5.

6 *Bolling v. Sharpe*, 347 U.S. 497 (1954).

7 *Brown v. Board of Education*, 347 U.S. 483, 495.

8 "Southern states" include Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia; "border states" include Delaware, Kentucky, Maryland, Missouri, Oklahoma, and West Virginia. For the legal situation on the eve of *Brown*, see Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 2nd ed. (Chicago, IL: University of Chicago Press, 2008), p. 42.

9 J. Harvie Wilkinson, *From Brown to Bakke: The Supreme Court and School Integration, 1954–1968* (New York: Oxford University Press, 1979), pp. 64–77.

10 *Brown v. Board of Education* [*Brown* II], 349 U.S. 294, 300 (1955).

11 Quotes drawn from Wilkinson, *From Brown to Bakke*, pp. 65–66.

12 *Cooper v. Aaron*, 358 U.S. 1 (1958).

13 *Griffin v. County School Board*, 375 U.S. 391 (1964).

14 Kluger, *Simple Justice*, p. 748.

15 Quoted in Reed Sarratt, *The Ordeal of Desegregation* (New York: Harper, 1966), p. 201.

16 Walter Gellhorn, "A Decade of Desegregation—Retrospect and Prospect," *Utah Law Review* 9 (1964): 6.

17 Quoted in Harrell R. Rodgers, Jr., and Charles S. Bullock III, *Law and Social Change: Civil Rights Laws and Their Consequences* (New York: McGraw-Hill, 1972), p. 72.

18 Wilkinson, *From Brown to Bakke*, p. 108.

19 Gary Orfield, *The Reconstruction of Southern Education* (New York: Wiley, 1969), p. 228.

20 *Green v. County School Board*, 391 U.S. 430 (1968).

21 *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, at 30–31 and 15.

22 *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973).

23 *Milliken v. Bradley* [*Milliken* I], 418 U.S. 717 (1974).

24 *Missouri v. Jenkins*, 515 U.S. 70 (1995).

25 *Pasadena Board of Education v. Spangler*, 427 U.S. 424 (1976); *Freeman v. Pitts*, 498 U.S. 1081 (1992).

26 *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701 (2007).

27 See the report of the Government Accountability Office, at www.gao.gov/products/GAO/16-345.

28 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 502 U.S. 1056 (1992).

29 *Roe v. Wade*, 410 U.S. 113 (1972).

30 *Dobbs v. Jackson Women's Health Organization*, 598 U.S. ___ (2022).

31 This account of the movement to liberalize state abortion laws relies on Marian Faux, *Roe v. Wade* (New York: Macmillan, 1988); Gerald R. Rosenberg, *The Hollow Hope*, chaps. 6–9; and N. E. H. Hull, William James Hoffer, and Peter C. Hoffer, *Roe v. Wade: The Abortion Rights Controversy in American History*, 2nd ed. (Lawrence: University Press of Kansas, 2010).

32 Rosenberg, *The Hollow Hope*, p. 180, table 6.1.

33 *Poe v. Ullman*, 367 U.S. 497 (1961). On how the Court initially avoided the birth control case, see Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962), pp. 143–156.

34 The article was Cyril Means, "The Phoenix of Abortional Freedom: Is a Penumbral or Ninth Amendment Right about to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common Law Liberty?" *New York Forum* 17 (Fall 1971): 335–410.

35 *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

36 *Roe v. Wade*, 410 U.S. 113, 153; *Griswold v. Connecticut*, 381 U.S. 479 (1965).

37 Lader's quote is from Lawrence Lader, *Abortion II: Making the Revolution* (Boston: Beacon Press, 1973), frontispiece; Krol's quote is from Faux, *Roe v. Wade*, p. 305.

38 Carol Sanger, *About Abortion: Terminating Pregnancy in Twenty-First-Century America* (Cambridge, MA: Belknap Press, 2017), p. 25.

39 Michele McKeegan, *Abortion Politics: Mutiny in the Ranks of the Right* (New York: Free Press, 1992), p. 130.

40 On the pro-life movement and abortion politics, see William Saletan, *Bearing Right: How the Conservatives Won the Abortion War* (Berkeley: University of California Press, 2003); and Mary Ziegler, *After Roe: The Lost History of the Abortion Debate* (Cambridge, MA: Harvard University Press, 2015).

41 *Harris v. McRae*, 448 U.S. 297 (1980); 238 members of Congress submitted an *amicus curiae* brief in the case, urging the Court to uphold the Hyde Amendment.

42 *Rust v. Sullivan*, 500 U.S. 173 (1991).

43 *Gonzalez v. Carhart*, 550 U.S. 124 (2007).

44 Striking down restrictions on abortion: *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) (spousal consent and parental consent); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (counseling and hospitalization requirements); and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1976) (burdensome medical procedures). Upholding restrictions on abortion: *Harris v. McRae*, 448 U.S. 297 (1980) (ban on Medicaid funding for abortions); and *H. L. v. Matheson*, 450 U.S. 398 (1981) (parental notification requirement).

45 Data compiled by the Centers for Disease Control, reported at https://www.cdc.gov/reproductivehealth/Data_Stats/Abortion.htm.

46 Rosenberg, *The Hollow Hope*, p. 187.

47 *Planned Parenthood of the Heartland v. Reynolds*, 975 N.W.2d 710 (Iowa. 2022); overruling *Planned Parenthood of the Heartland v. Reynolds,* 915 N.W.2d 206 (Iowa 2018).

48 *Planned Parenthood South Atlantic v. South Carolina*, ___ S.E.2d ___ (S.C. 2023); *Planned Parenthood Great Northwest v. Idaho*, ___ P.3d ___ (Idaho 2023).

49 https://ballotpedia.org/2022_ballot_measures#Trends_in_2022.

50 William K. Muir, Jr., *Prayer in the Public Schools: Law and Attitude Change* (Chicago, IL: University of Chicago Press, 1967).

51 Alexander Hamilton, John Jay, and James Madison, *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961), no. 78, p. 465.

52 For alternative perspectives on busing, see James S. Coleman, Sara D. Kelly, and John Moore, *Recent Trends in School Desegregation* (Washington, D.C.: Urban Institute, 1975), and Thomas Pettigrew and Robert L. Green, "School Desegregation in Large Cities: A Critique of the Coleman 'White Flight' Thesis," *Harvard Educational Review* 46 (February 1976): 1–53.

53 See Rosenberg, *The Hollow Hope*, p. 190, table 6.2.

11

State Court Policymaking

Although rulings such as *Brown v. Board of Education* and *Roe v. Wade* attract national attention, state court rulings also affect public policy. Indeed, according to Justice William Brennan, who served on both the U.S. Supreme Court and the New Jersey Supreme Court, "The composite work of the courts in the fifty states probably has greater significance [than that of the U.S. Supreme Court] in measuring how well America attains the ideal of equal justice for all."[1] This chapter focuses on state courts' constitutional policymaking in dealing with public school finance, same-sex marriage, elections, and abortion, highlighting the interplay between state courts and the U.S. Supreme Court. It also examines the distinctive role state courts play on their own in interpreting state constitutions and in common-law policymaking, focusing on products liability—that is, suits for damages for injuries caused by defective products—an area in which the role of federal courts is negligible. Put differently, this chapter reveals how state courts participate in governing, interacting with federal courts, with courts in other states, and with the state legislature and other institutions of state government.

PUBLIC SCHOOL FINANCE

Federal, not state, courts were initially at the forefront of legal efforts to reform the financing of public education. In 1971, Demetrio Rodriguez filed a class-action suit in federal district court, arguing that Texas's school finance system violated the equal protection clause of the Federal Constitution. The system Rodriguez challenged resembled those in most other states: funding for elementary and secondary schools came primarily from local property taxes, so the level of spending varied from one school district to another, depending on the value of taxable property in the

DOI: 10.4324/9781003440055-14

district and the rate at which it was taxed.[2] The interdistrict differences in spending per child could be substantial. At the time of Rodriguez's suit, the Edgewood Independent School District in San Antonio annually spent $356 per pupil, while the neighboring Alamo Heights district spent $564.

Rodriguez's lawyers argued that these disparities in funding led to unequal and inadequate education for students in property-poor districts and therefore violated the federal Constitution. A federal district court agreed and struck down Texas's school finance system as inconsistent with the equal protection clause of the Fourteenth Amendment. But in *San Antonio Independent School District v. Rodriguez* (1973), the U.S. Supreme Court reversed the district court's decision by a 5–4 vote.[3] The Court majority maintained that the equal protection clause of the U.S. Constitution did not require equal expenditures in school districts and that Texas's school finance system was constitutional.

Although *Rodriguez* precluded further challenges under the federal Constitution, it did not end school finance litigation. Over the next few decades, 16 state supreme courts ruled that the school finance systems in their states violated the state constitution.[4] Among these was the Texas Supreme Court, which unanimously ruled, 16 years after *Rodriguez*, that the state's school finance system violated the Texas Constitution.[5] Let us look at the transformation of school finance litigation and its consequences.

The Development of School Finance Litigation

Litigating for Change For courts to rule on the constitutionality of state systems of school finance, litigants must be willing to raise the issue and have a legal basis for their claims. *Brown v. Board of Education* was crucial in stimulating school finance litigation because it focused attention on the detrimental effects of inequalities in education, prompting critical scrutiny of the impact of other sorts of educational inequality. *Brown* also signaled the justices' willingness to use the equal protection clause to combat inequalities, encouraging potential litigants to believe that the Court would be receptive to their claims. Finally, the ruling seemed to show that the Supreme Court could inaugurate major social change, in contrast to the slow pace and uncertain results of state-by-state legislative reform of school finance. So school finance reformers pinned their hopes on the U.S. Supreme Court.

But the reformers had miscalculated badly. When *Rodriguez* came to the Supreme Court in the early 1970s, the Court's composition and orientation had changed. Republican President Richard Nixon had appointed four new justices who were more committed to judicial restraint than their predecessors and not interested in egalitarian crusades. In *Rodriguez*, the Nixon appointees supplied four of the five votes needed to uphold Texas's school finance system, ensuring that federal courts would not play a role in school finance reform.

State Courts and State Law But 13 days after the Supreme Court announced its decision in *Rodriguez*, the New Jersey Supreme Court in *Robinson v. Cahill* unanimously ruled the state's school finance system unconstitutional.[6] New Jersey's system for financing public education closely resembled Texas's, which—according to the U.S. Supreme Court—met federal constitutional requirements. So the New Jersey justices could not base their ruling on the federal equal protection clause. Instead, they held that New Jersey's school finance system violated the state constitution's requirement that the state provide for all children a "thorough and efficient system of education."[7]

Robinson transformed the campaign for school finance reform by reminding potential litigants that state systems of school finance had to satisfy state, as well as federal, constitutional requirements. It showed that the applicable state provisions were not identical to those in the federal Constitution; there was no federal analogue to the "thorough and efficient" clause or to other state constitutional requirements (see Box 11.1). *Robinson* also reminded litigants that a favorable ruling on school finance under the state constitution could not be reversed by the U.S. Supreme

Box 11.1 State Constitutional Provisions and School Finance

Many states have distinctive constitutional provisions relevant to school finance.

Illinois: The Illinois Constitution states that "a fundamental goal for the People of the State is the educational development of all persons to the limits of their capacities" and requires the state to "provide for an efficient system of high quality public educational institutions and services" (art. 10, sec. 9).

Montana: The Montana Constitution requires the state to provide "a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state" (art. 10, sec. 1).

New Jersey: "The Legislature shall provide for the support of a thorough and efficient system of free public schools" (art. 8, sec. 14).

New Mexico: "Children of Spanish descent in the state of New Mexico … shall forever enjoy perfect equality with other children in all public schools" (art. 12, sec. 10).

Texas: "It shall be the duty of the legislature of the state to establish and make suitable provision for the support and maintenance of an efficient system of public free schools" (art. 7, sec. 1).

Wyoming: The Wyoming Constitution mandates a "complete and uniform system of public instruction" (art. 7, sec. 1).

Court, because state supreme courts are the authoritative interpreters of their state constitutions. Thus victories won in state court would not turn into defeats in federal court. Finally, *Robinson* demonstrated that state courts might be more sympathetic to school finance challenges than were the federal courts. As the victorious attorney in Connecticut's school finance case put it, *Robinson* "fired my imagination."[8]

School Finance Litigation in State Courts After *Robinson*, reformers in several states initiated state constitutional challenges to school finance systems. In the seven years after *Rodriguez*, 12 state supreme courts heard challenges to their states' school finance systems (see Table 11.1).[9] Reformers enjoyed some success, prevailing in half the cases. After 1980, interest in school finance litigation waned. From 1981 to 1988, litigants filed only seven suits against school finance programs; and in all but one of those cases, the state supreme court upheld the states' programs.[10] But beginning in 1989, a new wave of litigation proved more successful.[11] Among these suits was one in New Jersey, where the state's supreme court ruled that the "reformed" program established after *Robinson* did not remedy "the constitutional failure of education in poorer urban districts" and mandated greater aid to those districts.[12]

In some states, the courts upheld school finance programs, but in others they invalidated them. Given the similarities among the challenged programs, why did state courts disagree about their constitutionality? Differences in state law cannot fully explain the disparate rulings, as state courts reached opposite results despite interpreting virtually identical constitutional provisions. The conflicting outcomes may reflect differences in

TABLE 11.1 School Finance Litigation in the States

Period	State Law Invalidated	State Law Upheld
1973–1980	New Jersey (1973), California (1976), Connecticut (1977), Washington (1978), Wyoming (1978), West Virginia (1979)	Arizona (1973), Montana (1974), Idaho (1975), Oregon (1976), Pennsylvania (1978), Ohio (1970)
1981–1988	Arkansas (1983), Colorado (1982), Maryland (1983), New York (1983), Oklahoma (1987), South Carolina (1988)	Georgia (1981)
1989–2023	Kentucky (1989), Montana (1989), Texas (1989), New Jersey (1990), Massachusetts (1993), Tennessee (1993), Ohio (1997), Vermont (1997), Kansas (2010), North Carolina (2022)	Wisconsin (1989), Minnesota (1993), Arizona (1994), Kansas (1995), Rhode Island (1995), Illinois (1996)

judges' conceptions of the judicial role (see Chapter 9). Some state judges, stressing the importance of judicial restraint, upheld school finance programs because they believed it proper to defer to the state legislature. Thus, the New York Court of Appeals (the state's supreme court) noted that it was "particularly appropriate for … the legislative body (reflective of and responsive as it is to the public will)" to make decisions about the allocation of public funds. Other judges feared that their "unwise and unwarranted entry into the controversial area of public school financing" would transform their court into a "super-legislature," and embroil it "in a turbulent field of social, economic, and political policy."[13]

Even some judges who invalidated state school finance programs insisted that judicial restraint guided their actions, asserting that their intrusion into a field traditionally reserved for the legislature was compelled by the state's violation of clear constitutional commands.[14] And troubled by the apparent conflict between fidelity to the state constitution and respect for legislative prerogatives, they tended to leave the design of remedial measures to the legislature. Yet some judges who invalidated state programs forthrightly embraced judicial activism. The West Virginia Supreme Court, for example, not only struck down the state's school finance system but also designated eight specific academic areas in which schools were required to develop student capacities.[15]

One might also expect that the justices' political views would explain the different rulings on such a controversial policy issue. But it is not clear that these views exerted much influence on decisions. Take, for example, the school finance case based on the Texas Constitution. The opinion of the court was written by Justice Oscar Mauzy, a Democrat who had formerly chaired the state senate's education committee. One might easily attribute his vote for the reform of school finance to his background and political perspective. Yet, if political backgrounds and views directly determined votes, one would not have expected the other eight members of the Texas Supreme Court—five Democrats and three Republicans—to join Mauzy's opinion. The New Jersey Supreme Court's rulings in *Robinson v. Cahill* and in *Abbott v. Burke* also defy explanation in partisan terms. Although the justices included both Democrats and Republicans, both decisions were unanimous.

State Courts and State Legislatures Once a court has identified a constitutional violation, the court must act to remedy it. In many cases, this is simple. A court may order officials to cease their unconstitutional conduct or award damages to those whose constitutional rights were violated. But in the school finance cases, the remedial task was more complicated. If a court found that the existing school finance system violated the state constitution, it would have to ensure that a constitutionally adequate system replaced it.

But could state supreme courts meet that responsibility? The judges had no special expertise in education policy, could not raise revenues to guarantee adequate funding for poorer districts, and were ill-equipped to supervise the implementation of policy. In short, they exhibited the very limitations that had led scholars such as Donald Horowitz to despair of effective judicial policymaking (see Chapter 9).

State supreme courts dealt with this problem in various ways. The California Supreme Court ruled that the state constitution required the state to ensure that funding per student did not depend on the wealth of the school district.[16] This ruling, along with Proposition 13—a subsequent anti-tax amendment to the California Constitution—produced a virtual equality of expenditures per student across the state. But the court avoided entanglement in the details of education policymaking only by ignoring the complexities of education policy, simply assuming that additional funding in poor districts would improve education.

A more complex situation confronted courts that invalidated school finance programs because they failed to provide a "thorough and efficient education" or failed to meet other state constitutional requirements. Such provisions imposed on state governments an obligation to provide a quality education for all students and on courts a duty to ensure that the state met that responsibility. But if the other branches of state government failed to meet their responsibility, should the state supreme court intervene with its own education plan?

Aware of their limitations as policymakers, most state supreme courts sought to achieve their educational goals through agenda setting. Instead of attempting to devise and impose their own policy, a task for which they felt ill suited, they provided only the broadest of guidelines, leaving it to the governor and state legislature to come up with a policy that met constitutional requirements. Thus, the courts' agenda setting reordered the political priorities of the other branches of state government, and invalidation of existing policy forced governors and legislatures to address the issue of school finance. But governors and legislatures were given considerable leeway to devise their own approaches to remedying the constitutional violations identified by the court. Judicial intervention therefore did not foreclose opportunities for legislative policymaking.

Agenda setting was attractive to state courts because it kept them from getting bogged down in the details of education policy. But it also involved them in ongoing oversight of legislative efforts to meet constitutional requirements. For example, in 1971 the New Jersey Supreme Court announced its initial ruling in *Robinson v. Cahill* (*Robinson* I), but it did not issue its final ruling in the case until 1976 (*Robinson* VII).[17]

Judicial agenda setting also did not guarantee prompt and effective reform of public education. It worked in Kentucky, where the governor and state legislature cooperated to produce landmark legislation that overhauled the state's system of public education and imposed the new taxes necessary to support the change.[18] But in many states, the legislative response was slow and begrudging. In retrospect, this was hardly surprising. That state legislatures had not previously initiated reforms on their own testified to the strong interests attached to the existing system of school finance. Also, school finance reform often got tied up in political maneuvering. In Texas, for example, it took four special legislative sessions and two gubernatorial vetoes before a new school-funding plan was enacted. In New Jersey, because the lame-duck governor lacked the political muscle for effective leadership, it took five years to get school finance reforms implemented, and even then they proved inadequate.

Even when legislatures did act, that did not always resolve matters. Judicial agenda setting gave legislators considerable leeway in determining how to satisfy constitutional requirements. Yet the greater the leeway, the more difficult it was for legislators to determine what the requirements were. What, after all, is "a thorough and efficient system of education," and how does one determine when it has been achieved? Also, legislators were sometimes loath to take responsibility for court-mandated reforms, particularly if they required tax increases or were otherwise unpopular. Some state legislators thus enacted laws that failed to meet fully the constitutional requirements set by the court or that sought to limit the effects of the court's ruling. In doing so, they were implicitly negotiating with the state supreme court about what sort of policy it would accept.

In such circumstances, state supreme courts could invalidate the new law and provoke a confrontation with the legislature, or they could avoid confrontation by upholding the new law even though it did not fully conform to their mandates. State supreme courts followed both courses—indeed, sometimes they did so simultaneously. Following its initial school-finance ruling, the New Jersey Supreme Court granted a nine-month extension after its deadline for legislative action ran out, a move that to some indicated a wavering judicial commitment to school finance reform. But four months later, the court reversed course and threatened to redistribute school aid itself if the legislature failed to act. Yet when legislation was enacted that only partially fulfilled the court's mandate, the justices upheld the legislation against constitutional challenges. Then, when the legislature balked at funding the new law, the court set a deadline after which the state was forbidden to operate schools under the old school finance program. The deadline passed, the state's schools closed, and, a week later, the New Jersey legislature appropriated funds adequate for the implementation of the new law.

Whatever the degree of cooperation between courts and legislatures, the question remains whether state judicial intervention has actually promoted better education for students in poorer districts. Most state rulings on school reform have focused on equalizing funding among school districts, assuming that a direct correlation exists between expenditure levels and educational outcomes. This focus may also reflect how plaintiffs have framed the issue of school reform, emphasizing easily quantifiable funding discrepancies. But whether funding equalization has translated into educational success remains unclear. Political officials and scholars have questioned the courts' emphasis on fiscal factors, insisting that dollars alone do not lead to improved education. So far, there is little systematic evidence documenting how school finance reform has affected student performance.[19]

Elections and State Constitutions

School finance was not the only issue on which state courts intervened after no remedy was available from the U.S. Supreme Court. In *Rucho v. Common Cause* (2019), the Supreme Court, while acknowledging that excessive partisan districting was "incompatible with democratic principles," held that the federal judiciary could not address partisan gerrymandering claims.[20] But, speaking for the Court majority, Chief Justice John Roberts expressly noted that state courts could address partisan gerrymandering under their state constitutions, in effect inviting those courts to get involved.

Some state courts did not need an invitation. Even prior to *Rucho*, the Pennsylvania Supreme Court had invalidated a districting plan that drew district lines to entrench the majority party's political power.[21] But by foreclosing resort to federal courts, *Rucho* prompted litigants to turn their attention to state courts enforcing state constitutions. Some of these constitutions expressly prohibit partisan favoritism in redistricting. All expressly confer the right to vote, many require "free and equal" elections, and some specifically affirm that voters have an equal right to elect government (see Box 11.2). Relying on these guarantees, by February 2023 cases had been filed in the courts in 17 states challenging congressional and legislative districting maps as partisan gerrymanders, and the courts in seven states had ordered the state legislature to redraw the maps.[22]

Partisan manipulation of legislative districts is an endemic problem. Yet two factors may limit state court participation in its resolution. First, citizens may choose to address the gerrymandering issue directly, without recourse to the courts. In several states they have done so by creating independent non-partisan districting commissions, often via the constitutional initiative, to preclude partisan gerrymandering.

Second, some state supreme courts may be reluctant to overturn the districting devised by their state legislatures, even if it arguably involves partisan gerrymandering. In recent years the political polarization in the United States has been reflected in state governments—in 2022 a single political party controlled the governorship and both houses of the legislature in 37 states. Neal Devins has observed that this “party polarization both exacerbates backlash risks and otherwise makes it less likely that state courts will disagree with the legal policy judgments embedded in state laws.”[23] If the executive and legislative branches in a state are controlled by a single political party, it is likely that the judicial branch, including the state supreme court, will be as well. Governors will appoint members of their own party to the supreme court, even if the selection system is nominally a merit-selection system. If judges are elected, voters will choose candidates from their own party whether the elections are partisan or nominally nonpartisan. These “red and blue state supreme court justices are likely to agree with red and blue state lawmakers and governors. In other words, there are fewer states now than before where the legal policy preferences of state supreme courts vary from those of elected officials.”[24] Even if they do, justices may be loath to announce decisions that will leave them open to political retaliation and electoral challenge, particularly when their rulings could be readily reversed via state constitutional amendment. Thus, according to Devins, judicial intervention based on state constitutions, if it occurs at all, is likely to be confined to the shrinking number of purple states.

Same-Sex Marriage and State Constitutions

The contrast in *Goodridge v. Department of Public Health* (2003) could hardly have been starker. Four justices of the Massachusetts Supreme Judicial Court concluded that the state could not restrict marriage to opposite-sex couples. “The Massachusetts Constitution,” Chief Justice Margaret Marshall wrote, “affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens.” The three dissenting justices saw the case differently: “Today the court has transformed its role as protector of rights into the role of creator of rights.”[25]

Yet the Massachusetts justices were not the first to vindicate the claims of same-sex couples. Four years earlier, in *Baker v. State*, the Vermont Supreme Court had held that the state’s constitution required that same-sex couples be afforded the same rights and benefits as opposite-sex married couples. And in *Baehr v. Lewin* (1993), the Hawaii Supreme Court had cast doubt on the constitutionality of a state law reserving marriage to opposite-sex couples. These rulings prompted immediate but disparate reactions. The Vermont legislature responded to *Baker* by allowing same-sex couples to enter into "civil unions," extending to them the benefits of marriage but not the right to marry. But voters in Hawaii adopted a state constitutional amendment giving the legislature "the power to reserve marriage to opposite-sex couples."[26]

Beyond the borders of Massachusetts, *Goodridge* activated both opponents and proponents of same-sex marriage. With the support of President George W. Bush, members of Congress proposed a federal constitutional amendment that defined marriage as the union of a man and a woman and prohibited interpreting federal or state constitutions to "require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman." But this proposal did not secure the required two-thirds majority in Congress. At the state level, opponents of same-sex marriage enjoyed greater success. From 2004 to 2012, 27 states amended their constitutions to restrict marriage to opposite-sex couples, joining Alaska, Hawaii, Nebraska, and Nevada, which had done so in the aftermath of *Baehr*.[27]

Goodridge also emboldened supporters of same-sex marriage. In the decade following the decision, Connecticut, Iowa, New Hampshire, New York, and Vermont all recognized same-sex marriages, and New Jersey and Rhode Island recognized same-sex civil unions. In Connecticut and New Jersey, legislative action followed state supreme court rulings recognizing the rights of same-sex couples, while in New Hampshire, New York, and Rhode Island, same-sex couples achieved legislative victories without judicial intervention. In 2012, the Maryland and Washington legislatures adopted same-sex marriage laws that were confirmed by subsequent referenda.

In California and Iowa, judicial rulings recognizing same-sex marriage prompted a backlash against the state supreme courts. After the Iowa Supreme Court unanimously struck down the restriction of marriage to opposite-sex couples in *Varnum v. Brien* (2010), opponents of the ruling first sought to overturn it by state constitutional amendment, but state legislators declined to propose such an amendment. The opponents then concluded that another way to change the court's ruling was to change the composition of the Iowa Supreme Court. They did so by defeating three justices who were up for retention elections in 2010. In addition, some legislators introduced impeachment resolutions against the four remaining justices who had struck down the Iowa prohibition on same-sex marriage. Although the effort to impeach the justices failed, the non-retention of some justices, plus the shot across the bow of impeachment resolutions, were designed to affect future decisions of the Iowa Supreme Court.[28] Yet public opinion on same-sex marriage quickly changed in the state, and Justice David Wiggins, one of the justices who held that the Iowa Constitution forbade the state from withholding marriage licenses based on sexual orientation, won his retention election in 2012.

In *In re Marriage Cases* (2008), the California Supreme Court ruled that limiting marriage to opposite-sex couples violated the state constitution. In response, opponents of same-sex marriage amended the state constitution to overturn the court's ruling; the California Supreme Court in *Strauss v. Horton* (2009) rejected a state constitutional challenge to the amendment. Stymied at the state level, supporters of same-sex marriage turned to the federal courts. Finally, in 2015, the U.S. Supreme Court by a 5–4 vote ruled that the U.S. Constitution protected the fundamental right to marry of same-sex couples.[29]

The reactions to *Goodridge* and other same-sex-marriage cases show that controversial judicial rulings rarely settle matters. The rulings contributed to the national debate over same-sex relationships, but they certainly did not end it. Nevertheless, judicial rulings such as *Goodridge* and its successors can elevate issues on the public agenda and often change the terms of debate. Thus, after *Goodridge* the focus shifted to constitutional amendments as a way to protect traditional understandings of marriage from judicial invalidation and to litigation in federal court as a way to extend the gains of *Goodridge*. So state court rulings on same-sex marriage show courts playing a crucial—but not a dominant—role in the policy process.

The Broader Context of State Constitutional Policymaking

The litigation over school finance, elections, and same-sex marriage shows how constitutional policymaking involves state supreme courts and other institutions of state government. State supreme courts' interactions with federal courts and supreme courts in other states, however, are also crucial to state constitutional policymaking.

Federal Courts and State Court Policymaking

Through the interpretation of their state constitutions, state supreme courts have had a major impact on educational policy, election law, and family law in their states, and their rulings have not been subject to review or reversal by the U.S. Supreme Court. Yet school finance, legislative districting, and same-sex marriage are not the only areas in which state courts have relied on state constitutions to protect rights not guaranteed by the federal Constitution. State bills of rights contain various other guarantees that have no parallel in the federal Bill of Rights (see Box 11.2). Even rights protected by the federal Constitution may have a different scope under state constitutions, due to distinctive constitutional language or state constitutional history. For example, whereas inequalities in school funding did not violate the equal protection clause of the federal Constitution, the California Supreme Court held that they violated the equality requirements of the California Constitution. Since the early 1970s, state courts have increasingly looked to state guarantees to develop a body of state civil-liberties law, a phenomenon known as "the new judicial federalism."[30]

Perhaps because state courts have primary responsibility for the administration of criminal justice, initially the main focus of the new judicial federalism was the elaboration of state guarantees of defendants' rights. Some state courts announced interpretations of state provisions—for example, on search and seizure, double jeopardy, and self-incrimination—that diverged from the U.S. Supreme Court's interpretation of analogous federal guarantees.[31] In other cases, state courts interpreted state provisions that differ from federal guarantees or have no federal analogue, such as Oregon's prohibition on "unnecessary rigor" in punishment and state guarantees of gender equality (see Box 11.2).

The new judicial federalism shows both the independent policy role played by state courts and the influence of federal court policymaking on state courts. From the 1930s to the 1960s, federal courts took a more expansive view of civil liberties than did state courts. This led litigants who sought to protect or expand rights to file their suits in federal court or base their claims in state court on the federal Constitution. Only when the Supreme Court became less receptive to their claims, as a result of personnel changes, did civil-liberties advocates turn their attention to state courts and state law. With multiple appointments by Republican presidents reconstituting the Supreme Court in recent years, it may be that civil-liberties advocates will again pursue their aims in state courts.[32]

Interstate Influences State rulings involving school finance, elections, and same-sex marriage show how state court decisions can have important effects beyond the borders of the state. The New Jersey Supreme Court's ruling in *Robinson v. Cahill*, for example, stimulated litigation in several states by showing the potential for state constitutional challenges to school finance programs. *Goodridge v. Department of Public Health* did the same for same-sex-marriage litigation. Indeed, the proliferation of groups using litigation to pursue policy reforms virtually ensures that battles won on one front will be refought on others. In mounting their challenges to school finance programs or bans on same-sex marriage, groups often drew on arguments made by courts in other states. Thus, after the New Jersey court relied on the state constitution's "thorough

Box 11.2 Distinctive State Constitutional Guarantees

Many state constitutions protect rights not mentioned in the U.S. Constitution.

Right to privacy: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest" (Montana Constitution, art. 2, sec. 10).

Ban on public aid to religious schools: "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment" (Washington Constitution, art. 1, sec. 11).

Right to a legal remedy: "All courts shall be open, and every person, for an injury done to him in his person, property, or reputation, shall have remedy by due course of law" (Connecticut Constitution, art. 1, sec. 10).

Right to fair elections: "All elections shall be free" (North Carolina Constitution, art. I, sec. 10).

Freedom from partisan gerrymandering: "No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent" (Florida Constitution, art. III, sec. 20 (a)).

Gender equality: "Equality of rights under the law shall not be denied or abridged by the State on account of sex" (Hawaii Constitution, art. 1, sec. 21).

Right to bear arms: "All persons have certain inherent and inalienable rights; among these are the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof" (Nebraska Constitution, art. 1, sec. 1).

Right to bail: "All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great" (Ohio Constitution, art. 1, sec. 9).

Freedom from excessive punishments: "Persons arrested or imprisoned shall not be treated with unnecessary rigor" (Utah Constitution, art. 1, sec. 9).

Right to safe schools: "Such public safety extends to public primary, elementary, junior high, and senior high school campuses, where students and staff have the right to be safe and secure in their persons" (California Constitution, art. 1, sec. 28).

and efficient system of education" clause to invalidate the state's system of school finance, reformers in other states with similar constitutional provisions argued that their state supreme courts should adopt the interpretation of the New Jersey court.

The precedents of other state supreme courts are of course not binding, as each state supreme court is the authoritative interpreter of its own state constitution. But the positive orientation toward precedent in the United States has promoted interstate borrowing. This orientation toward precedent created an expectation that state judges would consult and give weight to rulings beyond their borders even when they were not strictly controlling. It also encouraged attorneys to rely on out-of-state precedents to bolster their legal arguments. Finally, because state supreme courts have confronted common legal problems, they have found it useful to consider how other states had handled similar problems.

STATE COURTS AND THE COMMON LAW: THE TORT LAW REVOLUTION AND PRODUCT LIABILITY LAW

Tort law deals with civil wrongs (other than breach of contract) that result in death, personal injury, or property damage, for which a person can sue to recover damages. Tort law cases range from suits in "fender bender" traffic accidents to cases of medical malpractice to personal injury cases resulting from defective or dangerous consumer products. State courts largely prescribe the rules governing tort law cases through their elaboration of the common law.

These rules have changed dramatically since the 1950s. State appellate courts have transformed the standards for determining liability, abolished longstanding immunities from suits, and reduced or eliminated many other barriers that plaintiffs faced in recovering damages for injuries they had suffered. Particularly controversial have been state courts' innovations relating to product liability—that is, the responsibility of manufacturers or sellers for injuries suffered by consumers of their products. Some commentators insist these rulings have enhanced the safety of consumers by raising the costs that businesses pay for accidents, negligence, and poorly designed products. These higher costs, they argue, give businesses an incentive to remove dangerous items from the market and to develop safer products. However, other commentators claim that the nation's tort law system hinders innovation and reduces the competitiveness of U.S. firms without increasing safety.

This section examines how state judges have established new policy on the obligations of producers to consumers. It documents the policy changes that have occurred, considers the factors that have led state courts to inaugurate these changes, and assesses the claims of proponents and opponents about the effects of the tort law revolution. Finally, this section examines recent developments in the battle between plaintiff and defendant, involving the intersection of tort law and state constitutional law. Box 11.3 contains a glossary of terms pertinent to the debate over product liability law.

Box 11.3 A Products Liability Glossary

- **Assumption of risk**: The rule that persons accept the risks inherent in situations they willingly enter, such as taking a dangerous job, and therefore cannot claim damages if they are injured.
- **Comparative negligence**: The rule that plaintiff's recovery will be reduced in proportion to the degree that his own negligence was responsible for the injury he suffered.
- **Contributory negligence**: The rule that plaintiff may not recover damages if he is wholly or partially responsible for his injury.
- **Design defect**: A defect in a product that occurs because the design is not as safe as it should have been, though the product was manufactured as it was designed.
- **Enterprise liability**: Under this standard, liability rests on each member of an industry that produced a product that harmed consumers, with liability usually apportioned according to each member's share of the market for that product.
- **Failure to warn**: The failure of a defendant in a product liability case to have provided adequate warnings or instructions about the use of its product.
- **Fellow servant rule**: The rule that employers were not liable for workers' injuries brought about by the negligence of a fellow worker; they were liable only when they were personally at fault.
- **Manufacturing defect**: A defect resulting from a product's not having been manufactured as it had been designed.
- **Negligence:** The defendant's breach of a duty to exercise due care.
- **Privity of contract**: The contractual relationship between buyer and seller that provides a basis for liability for defective products. Traditionally, however, consumers under this doctrine could not sue manufacturers for defective goods unless they had bought the goods directly from the manufacturer.
- **Punitive damages**: In cases in which it is proved that the defendant acted willfully, maliciously, or fraudulently, a plaintiff may be awarded punitive or exemplary damages in addition to compensatory damages to punish the defendant or set an example for similar wrongdoers.
- **State-of-the-art defense**: The defense that permits a defendant in a design defect case to avoid liability if, at the time of manufacture, no safer design was available; or, in a failure-to-warn case, if, at the time of manufacture, there was no way for the defendant to have known of the danger he failed to warn against.
- **Strict liability**: Under this standard, one who sells a product in a defective condition unreasonably dangerous to a consumer is held liable for harm caused by the defect.
- **Tort**: Any civil legal wrong, other than a breach of contract, that results in personal injury, death, or property damage, and for which a person can sue to recover damages.

The Changing Face of Product Liability Law

The First Regime in Product Liability Law The first regime in tort law, and hence in product liability law, lasted into the middle of the nineteenth century. During this first regime, people were generally held responsible for any harm their actions may have caused, whether intentional or inadvertent. Underlying this standard was the notion that tort law exists primarily to redress injuries. This standard served to impede change in the society. Because people were responsible for any adverse effects their actions might produce, the prudent course was to refrain from action, particularly from risky or innovative action. Put simply, under the first regime, one acted at one's own peril.[33]

The Second Regime in Product Liability Law The second regime developed during the nineteenth century as state courts adapted the common law to the shift from an agrarian to an industrial economy. The key question confronting the courts was how to treat accidental injuries caused by risky, although socially useful, activities. For industrial capitalism to flourish, it was widely assumed that entrepreneurs had to be free to take risks and launch new enterprises without being held responsible for every adverse consequence of their actions. Society would presumably benefit if producers' freedom of action was maximized, even if this meant that the "quiet citizen must keep out of the way of the exuberantly active one."[34]

During the second regime, in the nineteenth century, state judges reconceptualized the aims of tort law, viewing it as primarily concerned with deterring injurious conduct. This switch in orientation from redressing injuries to deterring misconduct had far-reaching consequences. No longer was one responsible for all injuries caused by one's actions. Under the second regime, one was liable only if those injuries were foreseeable and if one failed to exercise due care to avoid them. In thus enshrining negligence as the standard for determining liability, state courts imparted a moral dimension to tort law; one was liable only when one's actions were blameworthy. But adoption of the negligence standard also made it more difficult for plaintiffs to secure redress for injuries. They had to prove not only that the defendant's actions injured them but also that the defendant had acted negligently. As Justice Oliver Wendell Holmes summed it up, "The general principle of our law is that loss from accident must lie where it falls, and that principle is not affected by the fact that a human being is the instrument of misfortune."[35]

State courts also limited producers' tort liability by modifying the traditional understanding of to whom obligations were owed. Under the first regime, one's duty of care was universal, extending to all people. Under the second regime, however, contract emerged as the primary basis for establishing obligations. If a producer entered into a contract with a purchaser, then both were in privity of contract, and courts would enforce the obligations established by the contract. But if a producer did not enter into a contract with a purchaser, because he did not sell directly to consumers, then the common law generally assumed that the producer had no duties to that purchaser. Moreover, producers could reduce the risk of product liability suits by disclaiming responsibility in sales contracts for injuries that their products might cause.

State courts developed other legal doctrines—the "fellow servant" rule, assumption of risk, and contributory negligence—that served to immunize producers from liability. Especially important was the contributory negligence doctrine, under which plaintiffs were barred from redress if their own negligence had contributed, no matter how slightly, to the injury they suffered. Although some state courts devised exceptions that eased the burdens on plaintiffs, the effect of legal developments during the second regime was to restrict the compensatory function of the law of torts.[36]

Liability Under the Second Regime To clarify the implications of the policies adopted by state courts under the second regime, consider the following scenarios, based on actual cases:

- Helen Henningsen was injured when the ten-day-old Plymouth she was driving crashed because of defects in the vehicle's steering system. She sued both the dealer who sold her husband the car and the manufacturer, seeking reimbursement for her medical expenses and the cost of repairs to the car.
- When David Larsen's Chevrolet Corvair collided head-on with another car, the force of the collision thrust the Corvair's steering column into Larsen's head. He sued General Motors, the manufacturer, claiming the Corvair's design was unsafe.
- In the late 1940s, several firms produced and marketed DES (diethylstilbestrol), a drug given to pregnant women to prevent miscarriages. In 1971, scientists discovered a link between DES and a form of cancer occurring in the daughters of women who took the drug. Because none of the "DES daughters" could identify which firm manufactured the DES taken by their mothers, they sued all of the manufacturers of the drug.

Under the product liability law that existed in most states from the mid-nineteenth century through the 1950s, the plaintiffs likely would have lost all three cases. In the first scenario, Mrs. Henningsen had not purchased the car; her husband had. Because she had not formed a contract with the Plymouth dealership, it had no contractual obligation to her. Moreover, even if her husband had been driving when the accident occurred, he could not have collected damages for medical expenses because the standard purchase agreement he signed limited the dealer's liability only to replacement of defective parts. Nor could the Henningsens have collected from the car's manufacturer, even if the vehicle was defective when it left the assembly line; neither Henningsen had privity of contract with Plymouth, so the manufacturer had no legal obligation to either of them. Finally, they could not collect from the dealer who sold them the car because the defect did not result from negligence on his part.

In the second scenario, David Larsen, the driver of the Corvair, also would not have collected damages under the second regime. Like the Henningsens, he had no contract with the car's manufacturer and so did not meet the requirement of privity of contract. In addition, the collision that led to his injury did not result from a defect in the manufacture of the car; all Corvairs had the same steering column. Finally, Larsen's injury occurred partly because of driver error, and thus the doctrine of contributory negligence, under which plaintiffs are barred from redress if their actions contributed to an injury, immunized General Motors.

In the final scenario, no company that produced DES would be held liable because none could be proven to have produced the DES that injured the daughters. The plaintiffs would also have had to prove that the companies either knew of, or should have foreseen, the carcinogenic properties of DES, because under a negligence standard one is liable for injuries one causes only if those injuries are foreseeable and preventable.

The Third Regime in Product Liability Law Beginning in the late 1950s, a fundamental shift occurred in product liability law as legal doctrines were developed that facilitated plaintiffs' efforts to obtain redress for injuries. Indicative of this shift is the fact that, under this third regime—contemporary product liability law—the plaintiffs in all three of the above scenarios were legally entitled to damages for their injuries.

Privity of Contract and Strict Liability In the first scenario, Mrs. Henningsen was able to recover damages because of the elimination of privity of contract. In *Henningsen v. Bloomfield Motors* (1960), the New Jersey Supreme Court ruled that when manufacturers offer a product for purchase, the product is accompanied by an implied warranty that it is suitable for use.[37] Those injured by defective products may sue for damages even if they have no contractual relation with the manufacturer. The court further held that manufacturers could not use contractual provisions to escape liability for injuries caused by their defective products.

Three years after *Henningsen*, the California Supreme Court went even further, adopting strict liability as the standard in product liability cases.[38] It thus held manufacturers of defective products responsible for any injuries they caused. Strict liability shifted the focus from the conduct of the producer, which was crucial under the negligence standard, to the product itself. All the plaintiff had to prove was that the product was defective and caused the injury.

Once the New Jersey and California supreme courts pioneered these changes, other state appellate courts quickly followed their lead. Within a decade and a half, more than two-thirds of the states had embraced strict liability and eliminated the requirement of privity of contract. As Lawrence Baum and Bradley Canon noted, “Never before had such a momentous change in tort law swept the American states so rapidly.”[39]

Design Defect and Comparative Negligence In the second scenario, Larsen’s injuries did not result from negligence or error in the construction of his Corvair; the car was manufactured exactly as it had been designed. Under current product liability law, however, conformity to design specifications is not decisive. State courts have recognized that a defendant may also be liable if the design of the product that caused an injury is defective—that is, if there was a safer alternative design for the product. In Larsen’s case, for example, there were ways to design a steering column so that it would not impale the driver’s head or chest in a collision. Chevrolet’s faulty design unreasonably created dangers, and thus Larsen could sue for damages suffered because of the defect.

Under the tort doctrines of the second regime, Larsen’s contributory negligence, his partial responsibility for the crash, would have barred him from recovering for his injuries. Today, however, most states have adopted the comparative negligence standard. Under this standard, a plaintiff’s partial responsibility does not preclude recovery for injuries. Instead, the damages received are merely reduced in proportion to the degree that one’s own negligence was responsible for one’s injury.

It is hard to overestimate the importance of these changes in expanding plaintiffs’ opportunities for redress. Adoption of comparative negligence eliminated a major barrier to product liability suits, while “strict liability for design defect has become a dominant part of the law governing products because it seems to be the only standard that can reach a large class of injuries left untouched by the earlier doctrines.”[40]

Failure to Warn, Enterprise Liability, and Punitive Damages The third scenario, the DES case, reveals another change in product liability law. The drug DES did serve the purpose of preventing miscarriages, and arguably no better design may have been available at the time it was produced. Nonetheless, DES was dangerous if used for other than its intended purpose; and even when used for its intended purpose, it had certain residual hazards. The manufacturers of DES, however, did not warn women of the dangers of the drug. Under modern product liability law, their failure to warn made them strictly liable for injuries caused by the drug. The only recognized exception to this warning requirement is if, at the time of manufacture, there was no way the defendant knew or could have known of the dangers that the product posed—the so-called state-of-the-art defense. Some states do not allow even this defense against failure-to-warn claims.[41]

Courts have also permitted recovery even when, as in the DES case, plaintiffs could not identify which company manufactured the product that harmed them. Rather than deny relief, courts established the doctrine of enterprise liability, under which all manufacturers of a product are required to pay damages for injuries the product caused. In the DES case, the court apportioned liability among the companies that had produced the drug based on their market shares. The doctrine of enterprise liability has proved particularly helpful in assessing liability in so-called toxic torts cases, such as those involving exposure to asbestos or Agent Orange, in which a huge number of plaintiffs have been injured by a generic product.[42]

Finally, when the defendant's conduct was willful, malicious, or fraudulent, courts may award punitive damages as well as compensation for injuries. Punitive damages punish defendants by imposing on them costs greater than the injuries they caused. Punitive damages also warn other potential wrongdoers of the costs of misconduct, possibly deterring such behavior. Because jury imposition of punitive damages can dramatically increase the liability of defendants, punitive damages have become very controversial.

Causes of the Revolution in Product Liability Law

The dramatic transformation of judicial policy from the second to the third regime, like that from the first regime to the second, reflected changes in both social conditions and social philosophy. The industrialization of the American economy in the late nineteenth century led to increased work-related accidents, as workers dealt with more dangerous machinery and materials. Consumers benefited from the wider range of products on the market but often lacked the technical expertise to assess the engineering or safety of modern goods. Neither could they individually bargain with mass producers for guarantees that the goods they bought were safe and durable. But when consumers and workers were injured, product liability law during the second regime made it difficult for them to collect damages.

This policy on product liability meshed with laissez-faire economic theory and the philosophy of rugged individualism dominant in the late nineteenth and early twentieth centuries. But over time the prevailing social and legal philosophy changed and, as it did, it affected perspectives on the relationship between producers and consumers. One scholar has characterized this new perspective as an expectation of "total justice," a notion that a person should obtain redress for any harm suffered.[43] Another scholar has emphasized the emergence of a "fiduciary ethic," a sense that individuals have a duty to see that their actions do not harm others.[44] If policy on product liability were to reflect these changing societal conditions and views, it would have to do more than mitigate the harshness of privity of contract and other legal doctrines. The new policy would have to make its primary aim compensating the victims of accidents rather than deterring misconduct.

Although changing conditions and societal views may have provided the impetus for a shift in the common law, the shift itself could not have occurred unless state judges were willing to overrule precedents and enunciate new legal standards.[45] Initially, some judges refused to do so, maintaining that the doctrine of *stare decisis* bound them to established legal principles. As one judge said, "The judicial wastebasket should not be filled with precedents only a few years old."[46] Other judges, also insisting on judicial restraint, argued that policymaking was the province of legislatures, not courts. But some state judges concluded that neither respect for precedent nor judicial role constraints prevented them from reforming product liability law. They argued that alteration of policies on product liability could not be a usurpation of legislative authority, because those policies had been established by judges and because courts were responsible for the growth of the common law as well as for maintaining legal stability. Thus, the New Jersey Supreme Court declared, "The law should be based on current concepts of what is right and just, and the judiciary should be alert to the never-ending need for keeping common-law principles abreast of the times."[47]

When activist courts, such as the New Jersey and California supreme courts, pioneered changes in product liability law, they dramatically altered the legal landscape. Legal principles that had appeared to be settled were settled no longer, and movement appeared to be away from previously established positions. Moreover, the rulings of these courts appeared to have vindicated the legitimacy of court-initiated policy changes. Finally, although most state appellate courts were reluctant to take the lead, they were also reluctant to defend legal doctrines that had been repudiated by a majority of their sister courts. In sum, by challenging the established doctrines in product liability law, the activist courts created a momentum that carried less adventuresome courts along the path of reform.

The Consequences of Policy Change

According to their proponents, the reforms in product liability policy have ensured safer consumer goods by inducing manufacturers to improve product safety rather than risk costly suits for injuries caused by their products. Although producers would bear the costs of injuries under the new product liability policy, proponents assumed that this was not a problem, because producers could figure those costs into the prices of the goods they sold and could purchase liability insurance to reduce their risks.[48]

But according to critics of the product liability reforms, this is not how the reforms have worked out. The changes in law have transformed "the doers, the makers, and the providers of this world into perpetual prey, pursued and worried at every turn by a hound-like legal profession."[49] In addition, erratic and excessive jury awards have prompted insurance companies to refuse coverage; one company official found the United States "as unpredictable from an underwriter's point of view as a banana republic."[50] And U.S. firms, deterred from innovation by the threat of lawsuits, have found themselves at a competitive disadvantage in the global marketplace. Let us examine these charges.

The Critique of Product Liability Reforms

Innovation and the Range of Goods Critics claim that changes in product liability policy have deterred entrepreneurial innovation to the detriment of consumers and the nation's place in the world economy. Under a system of strict liability, jurors focus on the defects in products rather than on the care taken in design and production to reduce risks for consumers. The jurors, critics claim, tend to sympathize with accident victims and are predisposed to assume that the new is more dangerous than the familiar. Therefore, they tend to award damages whenever a plaintiff using a new product is injured, even in the face of strong scientific evidence against the plaintiff's claim. And even when defendants ultimately prevail, the costs of defending liability suits can be ruinous. For example, although manufacturers of light aircraft won more than 80 percent of product liability cases brought to trial, liability costs have added an estimated $70,000 to the price of each light airplane.[51]

Faced with the prospect of excessive and at times capricious damage awards, firms may cease production of safe products or withhold new products from the market. A survey of the nation's 500 largest corporations found that 25 percent claimed to have withdrawn products from the market because of liability or insurance problems.[52] Firms may also decide to stick with products for which the risks are known, rather than develop new products, even if they believe the new products are safer. Indeed, a firm that develops a safer product opens itself up to suits by plaintiffs who use the advances to argue that there was a design defect in the earlier, less safe version. As one commentator summed it up, the "risk of lawsuits is so great, and the consequences so potentially disastrous, that the inevitable result is for more caution in product innovation [in the United States] than in other advanced nations."[53] This not only places U.S. firms at a competitive disadvantage with foreign firms but also deprives Americans of new, desirable, and often safer consumer goods.

Unjustifiable Awards and Frivolous Claims Critics also insist that contemporary product liability law exacerbates the worst tendencies of civil juries. Jurors lack the expertise to evaluate complex technical information but, under the strict-liability standard, cases often turn on testimony by scientific experts about the causes of injuries or defects in product design. Not surprisingly, then, jurors' decisions in product liability cases often are unpredictable. Critics also allege that jurors tend to be sympathetic to accident victims, hostile to corporations, and eager to impose the costs of accidents on "deep-pocket" defendants.[54] Judgments under current product liability law reflect those biases, with plaintiffs reaping excessive and undeserved damage awards and defendants saddled with punitive damages. Whereas until 1964 no plaintiff had ever been awarded a million dollars, today multi-million-dollar verdicts are common.[55]

These unjustified verdicts and excessive awards, critics charge, merely encourage more product liability litigation as plaintiffs seek to cash in and attorneys to earn large contingent fees at the expense of producers. The pro-plaintiff bias of civil juries and the capriciousness of their verdicts also affects the settlement of product liability cases. Fearful of an excessive award if they take a case to trial, defendants may settle cases even when the claims against them lack merit.[56] This, too, promotes more product liability suits.

Costs and Benefits What are the costs of this system of product liability? According to one estimate, the cost of the American tort system in 2009 was \$248.1 billion, or about \$808 per person.[57] Accident victims receive less than half that sum, with the remainder going to attorneys and insurers for administering the claims-settlement process. Despite these enormous expenditures, critics charge that Americans are not significantly safer than they were under the second regime. In sum, the policy adopted by state courts has proven to be an extremely costly but ineffective means of promoting consumer safety.

Evaluating the Evidence

Scholarly research does not fully support either the proponents or the critics of the new product liability regime.

A Product Liability Litigation Explosion? Critics charge that the changes in product liability policy encouraged an explosion in litigation against producers. The strongest evidence supporting this claim is the astronomical increase in product liability suits in federal courts: from fewer than 2000 in 1974 to more than 31,000 by 2002. But much of this increase was tied to suits involving three products (asbestos, the Dalkon Shield, and Bendectin), so there was no dramatic across-the-board increase in litigation.[58]

Neither is there a continuing product liability explosion in state courts, where the vast majority of product liability cases are heard. Tort filings in state courts did rise 39 percent from 1975 to 1999.[59] But the increase was not steady throughout this period, as accounts of a product liability explosion might lead one to believe, and in recent years the number of tort cases has declined. Today tort cases comprise 6 percent of state court caseloads, and products liability cases even less.[60]

A Boon for Plaintiffs? Critics also charge that the product liability revolution, combined with jury sympathy for plaintiffs and bias against businesses, resulted in unwarranted victories for plaintiffs and overgenerous awards when they do prevail. Yet no systematic data support this claim. Critics rely largely on "horror stories," simply assuming that the cases described are typical instead of isolated and unrepresentative. Also, the accounts of these cases are frequently exaggerated or inaccurate (see Box 11.4).[61]

A study of tort cases in state courts in the nation's 75 largest counties found that plaintiffs prevailed in just over half the cases (52 percent). Plaintiffs won just over a quarter of the time in medical malpractice cases (27 percent). Interestingly, although most tort cases involved jury trials, plaintiffs actually fared better in bench trials, winning 65 percent of the time. In those product liability cases in which plaintiffs prevailed, the median award was $450,000, with damages in almost 40 percent of the cases topping $1 million. In fewer than 3 percent of the cases were punitive damages awarded.[62] These data hardly support critics' claims. Juries do not overwhelmingly support plaintiffs, and punitive damages are rarely awarded. Yet one should be cautious in drawing conclusions from these data. For one thing, they report only cases that went to trial, but the vast majority of tort cases settled or dropped prior to trial. In addition, the figures on jury awards may be inflated, because trial judges

Box 11.4 A Simple Cup of Coffee

You may have heard of Stella Liebeck, the "McDonald's coffee lady." After the coffee she purchased at a McDonald's drive-through window spilled and burned her when she was attempting to remove its top to add cream and sugar, she sued McDonald's, and a jury awarded her almost $3 million in damages. Comedians had a field day with the incident, while critics charged that the "outrageous" verdict revealed a system of civil justice that was out of control, with greedy plaintiffs cashing in against "deep-pockets" defendants.

But, in fact, things were not that simple. For one thing, the injuries Liebeck suffered were quite severe. The coffee scalded her groin, thighs, and buttocks, resulting in third-degree burns over 6 percent of her body that required a week in the hospital and skin grafts. And Liebeck initially sought to recover only $20,000, a figure sufficient for her medical expenses, wages lost by her daughter while nursing her, and pain and suffering. As the trial date approached without a settlement, the amount demanded by Liebeck's attorney escalated to $300,000. A mediator encouraged McDonald's to settle for $225,000. But McDonald's denied responsibility, and the case went to trial.

The trial went badly for McDonald's. There was uncontradicted testimony that McDonald's served its coffee at an unusually high temperature and that it had refused to warn the public or lower the coffee's temperature, despite more than 700 previous complaints of scalding. The jury found for Liebeck, awarding her $160,000 in compensatory damages ($200,000 minus $40,000 for her 20 percent responsibility for her injuries). To punish McDonald's, the jury also awarded her $2.7 million in punitive damages, the equivalent of two days' worth of coffee sales by the corporation.

Did the accident make Stella Liebeck a millionaire? Not really. The trial judge subsequently reduced the punitive damages to $480,000, using a routine judicial standard that punitive damages should not be more than three times the compensatory damages. On appeal, the New Mexico Supreme Court upheld the reduction of the award. Nevertheless, the ruling did have broader effects. In the wake of the jury award, Wendy's restaurants reduced the temperature of their hot chocolate.

SOURCES: The account of the Liebeck case relies on Judith Acks, William Haltom, and Michael McCann, "Symbolic Stella: On Media Coverage of Personal Injury Litigation and the Production of Legal Knowledge," *Law and Courts* 7 (Summer 1997): 5–7; and Jay M. Feinman, *Law 101: Everything You Need to Know about the American Legal System*, 4th ed. (New York: Oxford University Press, 2014).

or appellate courts may subsequently reduce them. A study of verdicts in Cook County (Illinois) and San Francisco County, for example, found that reductions for jury awards of more than $1 million were close to 40 percent.[63] Finally, contrary to critics' claims, interviews with jurors reveal not a bias against business but a suspicion of plaintiff's motives and actions.[64]

What Effects on Safety and Innovation? Proponents and critics of the product liability reforms disagree sharply about how reforms have affected product safety. Proponents believe that changes in product liability law and in levels of litigation would prompt producers to devote greater attention to product safety, leading to fewer accidents. The very limited research available, however, has found no relationship between these legal changes and accident rates.[65] Even acknowledging that factors such as technological change and consumer demands may affect accident rates, there is no concrete evidence vindicating the hopes of product liability reformers.

Responses to the Product Liability "Crisis" Concerns about a crisis in product liability, whether warranted or not, have prompted legal changes designed to ease the burden on defendants. Some changes originated in state courts. Beginning in the 1980s, several supreme courts modified their policies on product liability. Some courts declined to extend doctrines that benefit plaintiffs to new situations. Thus, they refused to impose strict liability on producers of dangerous but defectless products—such as handguns, alcohol, and swimming pools—or on producers who failed to warn victims of scientifically unknown risks. Other state courts retreated from pro-plaintiff positions. The New Jersey Supreme Court, for example, limited the imposition of enterprise liability solely to asbestos cases.[66] Similarly, the California Supreme Court refused to extend liability to a drug company based, among other things, on the effect that would have on the development of new drugs.[67]

Even more important were so-called tort reform initiatives undertaken by state legislatures. Since the 1980s, legislatures in every state have enacted statutes to modify or overturn common-law doctrines enunciated by state courts. Thirty-two states established caps on punitive damages, and 23 on damages for noneconomic injuries such as pain and suffering. Some states discouraged suits through statutes of limitation that required that suits be filed within a set period after an injury was suffered. Others did so through statutes of repose. Utah, for example, barred product liability claims six years after purchase or 10 years after manufacture. Finally, some states sought to discourage litigation by placing limits on attorneys' contingent fees or by imposing sanctions on attorneys who filed frivolous suits.[68]

With the enactment of these tort reform statutes, the conflict over product liability law entered a new phase. The plaintiffs' bar responded to this legislation by challenging many of these tort reform statutes as unconstitutional. They argued that statutory limits on punitive or noneconomic damages violated state constitutional guarantees of jury trial because they limited the discretion of jurors in awarding damages. They also contended that statutes of limitation and statutes of repose violated the "open courts" provisions of state constitutions, which guarantee that the courts be available for the redress of injuries.[69] Their arguments enjoyed some initial success. During the 1980s and 1990s, supreme courts in 26 states invalidated more than 90 tort reform statutes.[70] But this hardly resolved matters. State legislatures continued to enact tort reform statutes, seeking to devise laws that would withstand judicial scrutiny. Meanwhile, proponents of tort reform have denounced the courts' rulings as an unwarranted substitution of judicial policy preferences for those of the people's representatives. It may be that the battle against judicial nullification of civil justice reform has just begun. Hotly contested and heavily financed state judicial elections (see Chapter 3) indicate that this battle will involve not only legal arguments to state supreme courts, but also attempts by both pro-plaintiff and pro-defendant forces to influence the composition of these courts. Indeed, a study of judicial elections in Ohio concluded that their outcomes dramatically affected the court's rulings in tort cases: "Seats changed hands between pro-plaintiff and pro-defendant justices with remarkable frequency, and the court's membership changes often produced marked shifts in doctrine and in parties' win rates."[71]

CONCLUSIONS

As school finance, same-sex-marriage, abortion, and election cases revealed, constitutional policymaking in state courts is influenced by those courts' relations with federal courts, supreme courts of other states, and other institutions of state government. But federal courts have considerably less influence on common-law policymaking. On occasion, federal rulings may guide state legal developments. For example, charitable institutions were immune from tort suits in most states until a ruling in a federal court of appeals led states to reconsider and eliminate the immunity.[72] But federal courts decide such a minuscule proportion of common-law cases that their opportunities for influence are limited.

Considerably more important is the influence of state courts on each other. In dealing with the common law, there is no legal text—no statute, constitutional provision, or administrative regulation—to interpret. So precedent, including the rulings of courts in sister states, becomes more important in guiding judicial decisions. Reliance on precedent contributes to stability in the law when the rulings in various states coincide. But when they diverge, state courts' reliance on precedent can, paradoxically, be a force for legal change. Success by a litigant in one state can encourage litigants in other states to raise the same legal issue. When they do, they can point to favorable precedents in other states in arguing for legal change. If a state court consults only its own prior cases, respect for precedent, or *stare decisis*, will promote legal continuity. But if a court considers precedents from beyond the state's borders, it may find conflicting interpretations of the common law. When it does, this conflict diminishes the authority of the court's prior rulings, because those precedents then represent only one possible interpretation of the common law. Or, from a different perspective, the availability of precedents to support both sides in a case gives judges the opportunity to choose which precedent they will follow. Thus, once some states adopted the strict-liability standard, judges in other states could decide whether to follow their own precedents or join the movement for strict liability.

The development of product liability law during the third regime also reveals that common-law policymaking takes place within the context of state politics. State legislators can by statute overturn legal principles enunciated by judges and redirect the course of the common law. For example, beginning in the 1980s, when some state legislatures viewed the product liability rulings of state judges as tilting too much in favor of plaintiffs, they intervened to redress the balance. State legislatures may affect the course of the common law even without legislating. After all, the potential for legislative intervention may itself act as a constraint on judicial decisions. Still, it would be a mistake to view the relations between state courts and legislators as simply conflictual. Most judicial decisions interpreting the common law provoke no response from legislators. Judicial decisions and legislative responses or non-responses can be viewed as a form of implicit negotiation, through which judges and legislators both seek to leave their mark on the common law.

NOTES

1 William J. Brennan, Jr., "State Supreme Court Judge versus United States Supreme Court Justice: A Change in Function and Perspective," *University of Florida Law Review* 19 (1966): 236.

2 William E. Thro, "To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation," *Virginia Law Review* 75 (1989): 1647.

3 *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

4 These cases include *DuPree v. Alma School District No. 30*, 651 S.W.2d 90 (Ark. 1983); *Serrano v. Priest* [*Serrano* II], 557 P.2d 929 (Cal. 1976); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *Gannon v. State*, 319 P.3d 1196 (Kan. 2006); *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989); *Helena Elementary School District No. 1 v. State*, 769 P.2d 684 (Mont. 1989); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973); *Seattle School District No. 1 v. State*, 585 P.2d 71 (Wash. 1978); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979); and *Washakie County School District No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980).

5 *Edgewood Independent School District v. Kirby*, 777 S.W.2d 391 (Tex. 1989).

6 *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973).

7 New Jersey Constitution, art. 8, sec. 14, para. 1.

8 Wesley W. Horton, "Memoirs of a Connecticut School Finance Lawyer," *Connecticut Law Review* 24 (Spring 1992): 706.

9 The cases during this period, in which plaintiffs' challenges succeeded, are listed in note 6 above. Unsuccessful challenges include *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975); *Milliken v. Green*, 203 N.W.2d 457 (Mich. 1972); *Woodahl v. Straub*, 520 P.2d 776 (Mont. 1974); *Board of Education v. Walter*, 390 N.E.2d 813 (Ohio 1979); *Olsen v. Oregon*, 554 P.2d 139 (Or. 1976); and *Danson v. Casey*, 399 A.2d 476 (Pa. 1978).

10 School finance reformers enjoyed their only success during this period in *DuPree v. Alma School District No. 30*, 651 S.W.2d 90 (Ark. 1983). Unsuccessful challenges include *Lujan v. State Board of Education*, 649 P.2d 1005 (Col. 1982); *Thompson v. McDaniels*, 285 S.E.2d 156 (Ga. 1981); *Hornbeck v. Somerset County Board of Education*, 458 A.2d 758 (Md. 1983); *Board of Education v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982); *Fair School Finance Council of Oklahoma, Inc. v. State*, 746 P.2d 1135 (Okla. 1987); and *Richland County v. Campbell*, 364 S.E.2d 470 (S.C. 1988).

11 Successful challenges to state systems of public school finance from 1989 onward include *Roosevelt Elementary School District v. Bishop*, 877 P.2d 806 (Ariz. 1994); *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989); *McDuffy v. Secretary, Executive Office of Education*, 615 N.E.2d 516 (Mass. 1993); *Helena Elementary School District No.1 v. State*, 760 P.2d 684 (Mont. 1989); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *DeRolph v. State*, 681 N.E.2d 424 (Ohio 1997); *Edgewood Independent School District v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Tennessee Small School System v. McWherter*, 851 S.W.2d 139 (Tenn. 1993); *Brigham v. State*, 692 A.2d 384 (Vt. 1997); and *Gannon v. State*, 319 P.3d 1196 (Kan. 2006). Unsuccessful challenges to systems of school finance include *Committee for Educational Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996); *Unified School District v. Kansas*, 885 P.2d 1570 (Kan. 1994); *Skeen v. Minnesota*, 505 N.W.2d 299 (Minn. 1993); *Pawtucket v. Sundlum*, 662 A.2d 40 (R.I. 1995); and *Kukor v. Grover*, 436 N.W.2d 568 (Wis. 1989).

12 *Abbott v. Burke*, 575 A.2d 359, 394 (N.J. 1990).

13 *Board of Education v. Nyquist*, 439 N.E.2d 359, 369 (N.Y. 1982); *Thompson v. Engelking*, 537 P.2d 635, 640–641 (Idaho 1975).

14 *Helena Elementary School District No. 1 v. State*, 769 P.2d 684, 689–690 (Mont. 1989).

15 *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979).

16 *Serrano v. Priest*, 557 P.2d 929 (Cal. 1977).

17 *Robinson v. Cahill* [*Robinson* I], 303 A.2d 273 (N.J. 1973); *Robinson v. Cahill* [*Robinson* VII], 360 A.2d 400 (N.J. 1976).

18 Kern Alexander, "The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case," *Harvard Journal on Legislation* 28 (Summer 1991): 341–366.

19 See Eric A. Hanushek, "When School Finance 'Reform' May Not Be Good Policy," *Harvard Journal on Legislation* 28 (Summer 1991): 423–456; and Ronald F. Ferguson, "Paying for Public Education: New Evidence on How and Why Money Matters," *Harvard Journal on Legislation* 28 (Summer 1991): 465–498.

20 *Rucho v. Common Cause*, 588 U.S. ___ (2019).

21 *League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania*, 178 A.3d 737 (Pa. 2017).

22 Brennan Center for Justice, *Redistricting Litigation Roundup*, at www.brennancenter.org/our-work/research-reports/redistricting-litigation-roundup-0 .

23 Neal Devins, "State Constitutionalism in the Age of Party Polarization," *Rutgers University Law Review* 71 (Summer 2019): 1141.

24 Ibid., at 1152.

25 *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003). For insights from an attorney campaigning for same-sex marriage, see Mary L. Bonauto, "Equality and the Impossible: State Constitutions and Marriage," *Rutgers Law Review* 68 (2016): 1481–1533.

26 *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Baehr v. Lewin*, 852 P.2d 44 (Hawaii 1993).

27 For a listing of states that constitutionalized a definition of marriage as limited to one man and one woman, see http://en.wikipedia.org/wiki/Same_sex_marriage_law_in_the_United_States_by_state.

28 *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

29 *Obergefell v. Hodges*, 576 U.S. 644 (2015).

30 G. Alan Tarr, "The New Judicial Federalism in Perspective," *Notre Dame Law Review* 72 (May 1997): 1097–1118.

31 Barry Latzer, *State Constitutions and Criminal Justice* (Westport, CT: Greenwood Press, 1991.

32 G. Alan Tarr, "Does the New Judicial Federalism Have a Future?" *Rutgers Law Review* 74 (Summer 2022): 1405–1427

33 This account relies on Jethro Lieberman, *The Litigious Society* (New York: Basic Books, 1981), pp. 34–36.

34 Quoted in Lieberman, *The Litigious Society*, p. 37. More generally, see Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, MA: Harvard University Press, 1977).

35 Quoted in Lieberman, *The Litigious Society*, p. 36. On the various—and at times competing—ends of tort law, see Robert E. Litan, Peter Swire, and Clifford Winston, "The U.S. Liability System: Background and Trends," in *Liability: Perspectives and Policy*, Robert E. Litan and Clifford Winston, eds. (Washington, D.C.: Brookings, 1988), pp. 3–5.

36 G. Edward White, *Tort Law in America: An Intellectual History* (New York: Oxford University Press, 1985), pp. 61–62.

37 *Henningsen v. Bloomfield Motors*, 161 A.2d 69 (N.J. 1960).

38 *Greenman v. Yuma Power Products Co*., 377 P.2d 897 (Cal. 1963).

39 Lawrence Baum and Bradley C. Canon, "State Supreme Courts as Activists: New Doctrines in the Law of Torts," in *State Supreme Courts: Policymakers in the Federal System*, Mary Cornelia Porter and G. Alan Tarr, eds. (Wesport, CT: Greenwood Press, 1982), p. 88.

40 Lieberman, *The Litigious Society*, p. 43.

41 For rulings rejecting the state-of-the-art defense, see *Beshada v. Johns-Manville Products Corp*., 447 A.2d 539 (N.J. 1982); and *Majdic v. Cincinnati Machine Co*., 537 A.2d 334 (Pa. 1988). For a ruling upholding the defense, see *Bernier v. Raymond Industries*, 539 A.2d 621 (Me. 1988).

42 The DES case is *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980).

43 Lawrence M. Friedman, *Total Justice* (New York: Russell Sage Foundation, 1985), chap. 4.

44 See Lieberman, *The Litigious Society*, chap. 1.

45 See Robert Keeton, *Venturing to Do Justice: Reforming the Private Law* (Cambridge, MA: Harvard University Press, 1969).

46 *Cochran v. Keeton*, 252 So. 2d 313, 318 (Ala. 1971).

47 *Schipper v. Levitt and Sons*, 207 A.2d 314, 325 (N.J. 1965).

48 Litan, Swire, and Winston, "The U.S. Liability System," p. 3.

49 Peter W. Huber, Liability: *The Legal Revolution and Its Consequences* (New York: Basic Books, 1988), p. 154.

50 Ibid., p. 141.

51 Robert Martin, "General Aviation Manufacturing: An Industry under Siege," in *The Liability Maze: The Impact of Liability Law on Safety and Innovation*, Peter W. Huber and Robert E. Litan, eds. (Washington, D.C.: Brookings, 1991), pp. 483–484.

52 Reported in W. Kip Viscusi and Michael J. Moore, "An Industrial Profile of the Links between Product Liability and Innovation," in Huber and Litan, *The Liability Maze*, p. 81.

53 Michael E. Porter, *The Competitive Advantage of Nations* (New York: Free Press, 1990), p. 649.

54 See Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (New York: Dutton, 1991).

55 Lieberman, *The Litigious Society*, p. 34.

56 Stephen Daniels, "The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building," *Law and Contemporary Problems* 52 (Autumn 1989): 279–280.

57 See "U.S. Tort Cost Trends: 2010 Update," at http://www.towerswatson.com/assets/pdf/3424/Towers-Watson-Tort-Report-1.pdf.

58 See http://www.uscourts.gov/caseload2002/tables.

59 See "Civil Trial Cases and Verdicts in Large Counties, 2001," at https://www.bjs.gov/content/pub/pdf/ctcvlc01.pdf.

60 See National Center for State Courts, Court Statistics Project, at http://www.courtstatistics.org/.

61 See Stephen Daniels and Joanne Martin, *Civil Juries and the Politics of Reform* (Evanston, IL: Northwestern University Press, 1995), and William Haltom and Michael W. McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis* (Chicago, IL: University of Chicago Press, 2004).

62 Deborah R. Hensler, Mary E. Vaiana, James S. Kakalik, and Mark A. Peterson, *Trends in Tort Litigation: The Story behind the Statistics* (Santa Monica, CA: Rand Corporation, Institute for Civil Justice, 1987), p. 19.

63 Mark A. Peterson, *Civil Juries in the 1980s: Trends in Jury Trials and Verdicts in California and Cook County, Illinois* (Santa Monica, CA: Rand Corporation, Institute for Civil Justice, 1987).

64 Valerie P. Hans and William S. Lofquist, "Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate," *Law and Society Review* 26 (1992): 85–115.

65 George L. Priest, "The New Legal Structure of Risk Control," *Daedalus* (Fall 1990): 207–227.

66 *Feldman v. Lederle Laboratories*, 479 A.2d 374 (N.J. 1984), narrowing *Beshada v. Johns-Mansville Products Corporation*, 447 A.2d 539 (N.J. 1982).

67 *Brown v. Superior Court*, 751 P.2d 470 (Cal. 1988).

68 For a state-by-state listing of reforms, see the website of the American Tort Reform Association, at http://www.atra.org.

69 Robert S. Peck, "In Defense of Fundamental Principles: The Unconstitutionality of Tort Reform," *Seton Hall Law Review* 31 (2001): 672–682.

70 For a listing of cases, see Victor E. Schwartz and Leah Lorber, "Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance," *Rutgers Law Journal* 32 (2002), appendix.

71 Lawrence Baum, David Klein, and Matthew J. Streb, *The Battle for the Court: Interest Groups, Judicial Elections, and Public Policy* (Charlottesville: University of Virginia Press, 2017), p. 46.

72 *Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942).

* * *

Index

A
- ABA *See* American Bar Association
- *Abbott v. Burke* 333
- Abortion 289, 309–319
  - as legal issue 311–314
  - *Dobbs v. Jackson Women's Health Organization* 309–310
  - major rulings on 309
  - *Planned Parenthood of Southeastern Pennsylvania v. Casey* and 309–311
  - *Roe v. Wade* and 314–319
  - *Webster v. Reproductive Health Services* and 158–159, 317
- Access to justice 112–121, 215, 235–238
- Adams, J. 28
- Administrative activity, oversight of 282–283, 288
- Administrative Procedure Act 283
- Adversary system 95–97, 117, 130–133, 134
- Affirmative action 15–16, 87, 103, 274
- African Americans
  - and equal justice 2
  - in legal profession 103
  - school desegregation and 298–308
- Agenda setting
  - appellate courts 160
  - Supreme Court 149–155
- Agent Orange litigation 213–216, 222
- Alien Terrorist Removal Court 28
- Alito, S. 72, 79, 159, 249–250, 260, 263, 310, 318
- Allen, F. 67
- *Allen v. Wright* 282–283
- Alternative dispute resolution (ADR) 231–237
- American Bar Association (ABA) 33, 45, 95–96, 104, 203, 219
  - group legal services and 116
  - *pro bono* work and 117
  - Standing Committee on the Federal Judiciary 50, 51, 71, 104
- American Civil Liberties Union (ACLU) 225
- American Judicature Society 45
- *American Jury, The* 146–148
- American Law Institute (ALI) 192
- Americans with Disabilities Act of 1990 35
- *Amicus curiae* briefs 155–156, 291, 321
- Antiterrorism and Effective Death Penalty Act of 1996 204
- *Apodaca v. Oregon* 144–145
- Arbitration 232–234
- *Argersinger v. Hamlin* 166
- Assigned counsel systems 167
- Assumption of risk 343, 345
- Attitudes of judges 258–261

B
Baehr v. Lewin 337–338
Bail 170–173
Baird, W. 254
Baker v. State 308, 337–338
Bakke, A. 15
Barber, K. 63
Bar exam 97, 99, 101
Barrett, A. 52–53, 80
Barristers 98–99
Bates v. State Bar of Arizona 114
Baum, L. 264–267, 347
Bell, G. 70
Bench trials 135–136, 142
Berrigan, D. 139
Betts v. Brady 24
Bickel, A. 79
Biden, J. 69
Bird, R. 64–65
Black, H. 152
Blackmun, H. 74, 79, 262, 314, 318, 325
Blackstone, W. 5
Blakely v. Washington 194
Blankenship, D. 61
Bolling v. Sharpe 302
Bork, R. 68
Boumediene v. Bush 32
Bowers, M. 255–256
Bowers v. Hardwick 241, 255–256
Brady, J. 190
Brennan, W. 39–40, 50, 74, 76, 157, 254
Breyer, S. 80, 85, 250, 311, 317
Brown, J. 74
Brown, W. 67
Brown v. Board of Education 16, 74, 118, 278, 279, 287, 298–304, 314, 330
  compliance with 302, 304
  effects of 308, 320–325
  Legal Defense Fund and 299–300
  opinion writing in 158, 303
  opposition to 307–308
  response to 302–304
  road to 299–300
  school finance litigation and 330
Burden of proof 134
Burger, W. 79, 158
Bush, G. H. W. 78, 79, 87, 113, 295, 316, 317, 318
Bush, G. W. 69, 76, 80, 295, 318, 338
Bush v. Gore 53
Busing 306–308
Butler, L. 62

C
Canon, B. 293–294, 347
Capital punishment 200–205
Caplin and Drysdale Chartered v. United States 278
Cardozo, B. 188, 242, 251, 259
Carter, J. 69
Centers for Disease Control 318
Certiorari, writ of 154
Chayes, A. 278–279
Child custody cases 286
Chisholm v. Georgia 31
Circuit courts 27–29
Civil law legal systems 3, 7–8, 11
  vs. common law systems 8
Civil Rights Act of 1964 35, 280, 304, 324
Civil unions *see* same-sex marriage 338
Clinton, W. 68, 71–72, 76–77, 87, 197, 316, 317
Closing argument 142
Coffee, L. 313
Coffin, F. 84
Common-law legal systems 3, 4–6
  vs. civil law 8
  development of 4–6
Common-law policymaking 283–285, 288
Comparative negligence 347
Constitutional Convention 27
Constitutional courts 26
Constitutional guarantees, distinctive state 341
Constitutional policymaking 274–278, 287
Contingent fees 115–116
Contract systems 167
Contributory negligence 345–347
Corporate counsel 107–108
Corpus Juris Civilis 7
Cosby, B. 144
Courts of appeals 36–38
Court of Chancery 12
Cross-examination of witnesses 132, 140–141
Cumulative policymaking 285–286, 288

D
Darrow, C. 138
Dartmouth College v. Woodward 156
Davidson, W. 303
Death penalty 200–205
Declaration of Independence 54
Deductive reasoning 250, 252, 256
Default judgments 227
De Muniz, P. 46
De novo trials 43
Depositions 221
Der Deutsche Rechtsschutz Verein 112
Dershowitz, A. 128–130
Design defect 343, 347
Devil's Advocate 93
Diamond v. Chakrabarty 281
Direct examination 140
Discovery 220–222
District courts 33–36
  cases heard in 34–36
  judicial selection for 69–70
Diversity of citizenship cases 30, 32, 33
Divorce cases 226, 229
Doe v. Bolton 309, 314
Dobbs v. Jackson Women's Health Organization 159, 255, 309–310
Douglas, W. 152, 157, 253
Dred Scott case 298
Drug courts 196–200
Due process 132–133
Duncan v. Louisiana 133
Duncan-Peters, S. 199

E
École Nationale de la Magistrature 82
Effective Death Penalty Act of 1996 32
Eisenhower, D. 71, 74, 76, 302
Eisenstadt v. Baird 254
Eisenstein, J. 179
Elections and state constitutions 336–337
Elementary and Secondary Education Act (ESEA) 304, 324
Elite law firms 105–108
England
  legal profession in 100–101
  and common law 5–6
Enterprise liability 348
Equity, law and 12
Escobedo v. Illinois 151
European Court of Human Rights 8
Evidence
  exclusionary rule and 186–190
  rules of 140–141
Ewing v. California 194
Exclusionary rule 186–190

F
Failure to warn 347–348
Faubus, O. 302
Federal Arbitration Act of 1925 233
Federal courts 26–39
  caseloads of 32–33, 35, 36–37
  development of 27–28
  interaction among 38–39
  jurisdiction of 29–33
  structure of 26–28
Federalism
  courts and 30–31, 47–48
  jurisdiction and 30–32
  new judicial 340
The Federalist Papers 148, 245, 246, 324
Federalist Society 71, 267
Federal judges
  for district and appeals courts 69–74
  selection of 67–80
  for Supreme Court 74–80
Federal Judicial Center 83
Federal judicial power 29
Federal jurisdiction
  caseloads and 30–31
  Civil War and 31
  federalism and 30–31
  law of 29–30
  politics of 30
Federal Rules of Civil Procedure 219–221, 222
Fellow servant rule 345–346
Fiduciary ethic 349
Fifth Amendment 134, 173
Flag-salute cases 150–151, 262
Fogan, R. 199
Foreign Intelligence Surveillance Court 28
Fortas, A. 24, 81
Fourteenth Amendment 24, 132, 277
Fourth Amendment 277
France
  judges in 82
  legal education in 97–99

Frankfurter, F. 81, 132–133, 152, 244, 262, 268, 280
Freedman's Bureau 112
Freeman v. Pitts 308
Furman v. Georgia 201–202, 262

G
Gableman, Michael 62
Galanter, M. 223–227
Garland, M. 50–53, 80
Gerrymandering 336–337
Gibson, J. 258
Gideon, C. 23–25
Gideon v. Wainwright 24, 111, 134, 166
Ginsburg, R. 72, 76–77, 80, 317
Goldfarb v. Virginia State Bar 114
Goldstein, S. 199
Gonzales v. Carhart 309, 317
Good faith exception 189–190
Goodridge v. Department of Public Health 337–340
Gorsuch, N. 51–53, 73, 79, 261
Government attorney 108–109
Governors, judicial appointment by 58
Grand jury 174–175
Gratz v. Bollinger 274
Gray, H. 152
Great Recession 46–47, 101, 111
Green v. County School Board of New Kent County 304–305, 321
Gregg v. Georgia 202
Griswold v. Connecticut 253–254, 314
Group legal services 116–117
Grutter v. Bollinger 103, 274
Guilt, beyond a reasonable doubt 134
"Guilty but mentally ill" verdict 192
Gutterman, L. 13–14

H
Habeas corpus 23, 204
Habeas Corpus Act of 1867 31
Hall, M. 60
Hamilton, A. 67, 148, 246, 324
Harlan, J. M. 81
Harvard Law School 78, 100, 103
Hatch, O. 71
Heien v. North Carolina 190
Heinz, J. 109
Helms, J. 315
Henningsen v. Bloomfield Motors 346–347
Hinckley, J. 190, 191, 193
Hoffman, M. 199–200
Hollingsworth v. Perry 341
Holmes, O. W. 13, 79, 152, 245, 344
Hora, P. 199
Horowitz, D. 290–293, 334
Houston, C. 299–300
Howard University Law School 92, 103
Hung juries 145
Hyde Amendment 309, 316

I
In forma pauperis 149
Inquisitorial systems 95–97
In re Marriage Cases 339
Insanity defense 190–193
Intercourt relations, federal courts 37–38, 39–40
Intermediate courts of appeals 42, 43
Internal Revenue Service 283
Interrogatories 221
Ives v. South Buffalo Railway 32

J
Jackson, K. 73–74, 260
Jackson, R. 39, 264
Jacob, H. 179
James v. Wallace 277, 278–279
Jay, J. 246
Jefferson, T. 28
Johnson, F. 277, 279
Johnson, G. 250
Johnson, L. 76, 81, 92, 112, 317
Johnson v. Louisiana 144–145
Johnson v. Zerbst 134
Judges' Bill of 1925 32–33
Judicial accountability 54–55
Judicial activism 293–294, 295
Judicial capacity 290–293
Judicial decision making
  deductive model of 250–252
  impact of judicial elections on 59–63
  institutional factors in 263–264
  legal perspective on 243–256
  legal realist perspective on 252–256
  originalism and 246
  personal values and 256–257

  political perspective on 256–264
  precedent in 247–250
  tools of 244–250
  uncertainty and 13–14
Judicial independence 53–54, 86
Judicial representativeness 54–55
Judicial restraint 293–294
Judicial review 274–278
Judicial role orientations 261–263
Judicial selection
  effects of systems for 59–63, 66
  in France 82
  gubernatorial appointment 58
  legislative election 59
  merit-based 55–56, 64–66
  nonpartisan election 58–63
  partisan election 58, 58–63
  politics of 59–65
  Supreme Court 74–80
  under Biden 73–74
  under Obama 71–73
  under Trump 71, 73
Judicial training 83
Judiciary Act of 1789 27, 30, 31
Judiciary Act of 1875 31
Juries
  decision making by 144–147
  evaluating 145–148
  grand juries 174–175
  hung juries 145
  instructions to 142–143
  mock juries 139
  nullification by 143–144
  right to trial by 133
  selection of 136–139
  size of 144–145
Jurisdiction, federal 29–33

K
Kagan, E. 77, 79, 150, 246, 261
Kavanaugh, B. 68, 73, 75, 261
Kaye, J. 197
Keane, D. 108
Kennedy, A. 157, 241–242, 310
Kennedy, J. 70
Kennedy, R. 69
Keyes v. School District No. 1, Denver, Colorado 307
Kluger, R. 303
Koerner, G. 99
Kritzer, H. 222
Krol, J. 315

L
Lader, L. 314
Langdell, C. C. 99–100
Larsen, D. 346
Lathrop, M. 103
Law clerks 83–84, 152–153
Law firms 105–107
Lawrence v. Texas 241–242, 255, 265
Law School Admission Test (LSAT) 97
Law schools 97–101, 107
  cost of 101
  diversity in 105–109
  enrollments 103
  instruction 100
  selectivity of 100–101
Lawyer
  access to services of 115–121
  African-Americans as 103
  British 98–99
  clients and 117–120
  contingent fees and 115–116
  defense attorneys 166–167
  demographic composition of 102–103
  divided legal profession and 109–110
  education 97–101, 103–104
  ethics and 94–95
  female 102–103
  in inquisitorial system 95–97
  number of 1, 102
  organization of legal profession and 104
  practice of law and 104–109
  pro bono work by 117
  prosecutors 165–166
  public defenders 111, 166–167
Lee v. Weisman 13–14
Legal aid 112–114
Legal briefs 155–156
Legal clinics 114
Legal Defense Fund 92, 118–119, 299–302, 304
Legal practice
  types of 92–93, 105–109
Legal Realists 252–256, 267
Legal reasoning
  deductive 250–252
  by example 252–256
  originalism and 245
Legal Services Corporation (LSC) 112–113, 119–121

Legal Services Program (LSP) 112
Legal systems 2–8
  civil-law 6–8
  common-law 4–6, 8
LegalZoom 115
Legislative history 245–248
Levi, E. 252–254
Liebeck, S. 353
Litigation explosion 215, 230–231
Liu, G. 72–73

M
Madison, J. 27
Major question doctrine 282
Mandatory minimum sentences 194–195
Mann Act 244–245, 280–281
Mansfield, A. 102
Mapp v. Ohio 187, 188–189
Marbury v. Madison 276
Marshall, M. 337
Marshall, T. 76, 91–93, 94, 118, 301–302, 321
Martin, T. 2
Mauzy, O. 333
Maynard, E. 61
McCleskey v. Kemp 202
McConnell, M. 50–52
McCorvey, Norma 313
McCrary, R. 23
Means, C. 312
Mediation 234–235
Merit-based judicial selection (Missouri Plan) 55, 59, 64–66
Military Commissions Act of 2006 32
Milliken v. Bradley 299, 307, 321, 322
Miranda v. Arizona 151, 155–156
Missouri v. Jenkins 308
Mr. Dooley 260
M'Naghten, D. 191
M'Naghten test 191–193
Mortensen v. United States 280–281

N
Napoleonic Code 7
Nardulli, P. 181
National Association for the Advancement of Colored People (NAACP) Legal Defense Fund *See* Legal Defense Fund
National Association for the Repeal of Abortion Laws (NARAL) 312
National Environmental Protection Act 283
National Federation of Independent Business v. Sebelius 54, 156
National Judicial College 82, 83
Negligence, product liability law and 345–348
New England School of Law 100
New judicial federalism 340
New York, court system of 44
Nixon, R. 76, 78, 79, 153, 158, 276, 330
Nonpartisan election of judges 58–60
Not guilty by reason of insanity (NGRI) 190, 192, 193
Nullification, jury 147–148

O
Obama, Barack 1, 50–51, 69, 71–73, 78, 79, 87, 316
O'Connor, S. 76, 80, 87, 88, 158, 262
O'Neill, J. 128
Omnibus Judgeship Act of 1978 69
One-shotters (OS) 224–227
Opening statements, at trial 139–140
Operation Rescue 315
Oral arguments, to Supreme Court 156–157
Originalism 245
Oversight of administrative activity 282–283, 288

P
Parents Involved in Community Schools v. Seattle School District No. 1 308
Partial birth abortion 317–318
Partisan election, of judges 56–63
Pasadena Board of Education v. Spangler 308
Penn, W. 143
Peremptory challenges 137–138
Planned Parenthood of Southeastern Pennsylvania v. Casey 262, 309–310, 317, 323
Plea bargaining 175–185
  criticisms of 182–183
  evaluation of 183–185
  in Germany 177
  in Great Britain 177
  process of 175–179
  reasons for 179–182

Plessy v. Ferguson 278, 298
Porteous, T. 68
Portia Law School 100
Powell, L. 15, 76, 91–93
Pratt, G. 214
Precedent 247–250
Preliminary hearings 173
Pretrial conference 222–223
Private law 8–10
Privity of contract 345–346
Pro bono work 117
Product liability law 342–355
  causes of revolution in 348–350
  consequences of policy change in 350
  critique of policy change in 350–351
  first regime of 344
  glossary of 343
  second regime of 344–345
  strict liability 346
  third regime of 346–348
Pro-life response 315–317
Proposition 13 334
Prosecutors 165–166, 170, 180–187
Public defenders 111, 115, 167, 178
Public law 8–10
Punitive damages 343, 347–348, 351, 352

R
Ramos v. Louisiana 145
Reagan, R. 69, 71, 76, 77, 78, 87, 113, 190, 193, 262, 295, 316–317
Regents of the University of California v. Bakke 15–16
Rehabilitation 193
Rehnquist, W. 33, 79, 154–155, 157, 160, 204, 313
Rein, C. 108
Release on recognizance 172
Remedial policymaking 278–279, 287
Reno, J. 197
Repeat players (RP) 228–230
Republican Party of Minnesota v. White 60
Resnick, A. 61
Retention elections 64–65
Reutershan, P. 213
Rights at trial 22, 136–138
Roberts, J. 78, 80, 82, 84, 263, 317, 336
Robinson v. Cahill 279, 331–335, 338, 340
Rodriguez, D. 329
Roe v. Wade 16, 80, 154, 159, 254, 255, 262, 329
  effects of 320–325
  response to 16, 317–320
Roman law 7
Roosevelt, F. 79
Roosevelt, T. 79
Rucho v. Common Cause 336
Rule of Four 153
Russell, C. 81
Rust v. Sullivan 316
Ryan, G. 205
Ryan, M. 213

S
Same-sex marriage 337–339, 340–341
San Antonio Independent School District v. Rodriguez 330–331
Scalia, A. 51, 77, 156–157, 158, 242, 246, 265, 266, 313
School desegregation 298–308
School finance 329–336
Schumer, C. 51–52
Selsor, M. 200–201
Senate
  judicial selection and 51–53, 68–73, 79–80
  Supreme Court nominees and 53, 79–80
Sentencing Reform Act of 1984 194
Sentencing reforms 195–196
Separate but equal doctrine 298, 299
Shadow docket of the Supreme Court 150
Simpson, O. J. 1, 137, 138
Sixth Amendment 110, 133, 134, 184–186, 196, 278
Smith, W. 190
Solicitors 98–99
Sotomayor, S. 73, 77, 79, 81, 260, 261
Souter, D. 79, 263
Speedy Trial Act of 1974 133
Spence, G. 138
Standing Committee on Federal Judiciary (ABA) 50, 51, 71, 104
Stare decisis 6, 247–250, 263, 310, 321, 343–344, 356
Starr, K. 72
State bar associations 104

State constitutions 339–341
State courts 39–47
  caseloads in 40–41, 43, 46, 236
  development of 45–46
  election law and 339
  great recession and 46–47
  product liability law and 344–352, 357–358
  same-sex marriage and 337–340
  school finance and 333–336
  structure of 41–46
State-of-the-art defense 348
Statutory interpretation 244–250, 279–282, 287–288
Stenberg v. Carhart 317
Stevens, J. 205
Stewart, P. 201
Strauss v. Horton 339
Strickland, D. 197
Strict liability 346–347
Supreme Court, U.S. 38, 149–160, 298–319
  agenda setting 149–155
  case selection 151–155
  decision making by 157–159
  establishment of 27
  law clerks 152–153
  opinion writing 158–159
  oral arguments in front of 156–157
Supreme courts, state 41–42, 45, 333–342
Swann v. Charlotte-Mecklenburg Board of Education 305, 323

T
Taft, W. H. 32–33
Tax Court 26–28
Texas v. Johnson 250–251, 253
Therapeutic justice 198
Thomas, C. 52, 68, 76, 87, 159, 255–256, 260, 263
Three-strikes laws 194–195
Tocqueville, A. 14–15, 149–150
Tort reform 354–355
Trials 129–140, 143–147
  bench *vs.* jury 135–136
  character of disputes at 130–132
  diversity of 132
  in inquisitorial system 95–96
  process of 135–143, 143–148
  rights at 132–133
Truman, H. 79, 153
Trump, D. 1, 39–40, 51, 69, 79, 81, 316
Trump v. Hawaii 38–39
Tushnet, M. 300

U
United States v. Booker 194–195
United States v. Nixon 79, 158, 276
U.S. Court of Military Appeals 26, 28
U.S. Supreme Court *See* Supreme Court, U.S.
University of Michigan Law School 103, 274
University of Virginia Law School 103

V
Varnum v. Brien 338
Virginia, court system of 46
Voir dire 136–137
Von Bulow, C. 127–129
Von Bulow, S. 127

W
Warren, E. 158, 301
Wasby, S. 151
Webster v. Reproductive Health Services 158, 317
Weddington, S. 313
Weeks v. United States 186–187
Weinstein, J. 214–215
Weisman, D. 13
White, B. 68, 137, 241–242, 313
white flight 307–308, 325
White, M. 205
Wiggins, D. 339
Williams v. Florida 144–145
Williams-Yulee v. Florida Bar 60
Wolf v. Colorado 187
Women
  lawyers 102–103
  as state judges 67
Woodson v. North Carolina 202
Writ of certiorari 151–155

Y
Yale Law School 101
Yannacone, V. 213–214

Z
Zimmerman, G. 2